(17,509.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 395.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PASOS, CLAIMANT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 9, 1899.

1 In the District Court of the United States, Southern District of Florida.

UNITED STATES OF AMERICA
vs.
SLOOP "PAQUETE" & CARGO. } Prize.

To the Honorable James W. Locke, judge of the district court of the United States for the southern district of Florida:

The libel of Joseph N. Stripling, attorney of the United States for the southern district of Florida, who libels for the United States and for all parties in interest against the Spanish sloop "Paquete" & cargo, her tackle, apparel and furniture, and cargo, in a cause of prize, alleges—

That pursuant to instructions from the President of the United States Robert Berry, a commander of the United States Navy, in and with the United States ship of war the "Castine," her officers and crew, did, on the 25th day of April, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas as a prize of war the said "Paquete" with a valuable cargo on board of the same, and that the said ship and cargo have been brought into the port and harbor of Key West, in the State of Florida, where the same now are, within the jurisdiction of this court, and that the said vessel and cargo are lawful prize of war and subject to be condemned and forfeited to the United States as such.

Wherefore the said attorney prays that all persons having
2 or claiming any interest in said vessel or cargo may, by the proper process of this court, be duly notified of the allegations and prayers of this libel, and cited to appear and claim the same; that the nature, amount, and value of said cargo may be determined, and that on proper proofs being taken and heard and all due proceedings being had the said sloop "Paquete," together with her tackle, apparel, furniture, and her cargo, may on the final hearing of this cause by the definitive sentence and decree of this court be condemned, forfeited, and sold as a prize of war and the proceeds distributed according to law.

J. N. STRIPLING,
U. S. Attorney, S. D. of Florida.

Let attachment and mo-tion issue as prayed, returnable Thursday, day of 13th May, A. D. 1898, 10.30 a. m.

Entered as of course.

E. O. LOCKE, *Clerk*,
By J. OTTO, *D'y Clerk.*

(Endorsed:) In the district court of the United States, southern district of Florida. United States *vs.* Spanish sloop Paquete & cargo. Libel. Filed Apr. 27th, 1898. E. O. Locke, clerk.

3 UNITED STATES OF AMERICA:

District Court of the United States, Southern District of Florida.

The President of the United States to John F. Horr, Esq., the marshal of the United States for the southern district of Florida, Greeting:

You are hereby commanded forthwith to attach, seize, and take into your custody the schooner Paquete and cargo, wheresoever the same may be found within your precincts, and the same you are required to keep until the further order of this court, to answer the claim of the United States for prize.

And how you shall have executed this precept make known to the said court, at the court-rooms, in Key West, the 13th day of May, A. D. 1898, at 10.30 o'clock a. m., by a return hereof, with your certificate of execution hereon written.

Witness the Honorable James W. Locke, judge of the said court, at Key West, in said district, this 27th day of April, in the [SEAL.] year of our Lord one thousand eight hundred and ninety-eight, and Independence of the United States the hundred and twenty-second.

E. O. LOCKE, *Clerk*,
By J. OTTO, *Deputy*.

(Endorsed:) U. S. district court, southern district of Florida. United States *vs.* Sloop Paquete and Cargo. Attachment. Filed Apr. 28, 1898. E. O. Locke, clerk.

(*Return of Marshal.*)

Received the within writ of attachment April 27th, 1898, and fully executed it on the same day by attaching and taking into my custody the Spanish sloop Paquete.

JOHN F. HORR, *U. S. Marshal*,
By ALFRED ATCHINSON, *Deputy*.

4 UNITED STATES OF AMERICA:

District Court of the United States, Southern District of Florida.

The President of the United States to John F. Horr, Esq., the marshal of the United States for the southern district of Fla., Greeting:

Whereas, on the 27th day of April, A. D. 1898, the United States of America, by their proctor, Joseph N. Stripling, Esq., filed in the office of the clerk of said court their libel against the Spanish sloop "Paquete" in a cause of prize, civil and maratime, alleging in substance that she was captured by the U. S. S. Castine April 25th, 1898;

Wherefore the said libellant prays that the usual process of attachment may issue against the said sloop Paquete, that monition may issue citing all parties having or claiming any interest or prope-ty in said sloop Paquette to appear and answer upon oath all and

singular the matters aforesaid, and that this court will be pleased to decree to the libellant the proceeds of said prize for service in said cause, and that the said sloop Paquete may be condemned and sold to pay the said prize money, with costs, charges, and expenses, and that the libellant may have such other and further relief in the premises as in law and justice *he* may be entitled to receive; and whereas the judge of said court has ordered that attachment and monition be issued as prayed, returnable on Thursday, the 12th day of May, A. D. 1898:

Now, therefore, you are hereby commanded forthwith to cite and admonish all persons whomsoever having any *wright*, title, claim, or interest in or to the said sloop Paquete to appear at an admiralty session of said court, to be held at the court-rooms of *of* said court, *of* Key West, in said district, on Thursday, the 12th day of May, A. D. 1898, at 10.30 o'clock in the forenoon of that day, to show cause, if any they have, why prize money should not be decreed according to the prayer of the libellant, and to attend upon every session of said court from that time held until a final decree shall be rendered in the premises.

And this you are required to do by serving on the master of said vessel a true copy hereof and by posting two other such copies in the most public places of Key West.

And how you shall have executed this precept make known to this court by a return hereof on or before the 12th day of May, aforesaid, with your certificate of execution hereon written.

Witness the Honorable James W. Locke, judge of said court, at Key West, in said district, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the hundred and twenty-first.

E. O. LOCKE, *Clerk*,
By J. OTTO, *D'y*.

(Endorsement:) U. S. district court, southern district of Fla. United States *vs.* Sloop Paquete and Cargo. Monition. Filed Apr. 28, 1898. E. O. Locke, clerk.

(*Return of Marshal.*)

Received the within writ of monition Apr. 27, 1898, and executed it on the same day by reading same to the master of the Spanish sloop Paquete and posting 2 copies, as within commanded.

JOHN F. HORR,
U. S. Marshal, So. Dist. of Fla.,
By ALFRED ATCHINSON,
Deputy U. S. Marshal.

6 KEY WEST, FLORIDA, 19*th May*, 1898.

SIR: On April 25th last the Spanish fishing sloop "Paquete," of Havana, a blockaded port, was captured by the U. S. S. Castine off the port of Mariel, Cuba, at 6.10 p. m.

2. The prize, with crew, and all papers found on board in a sealed

package were sent in charge of a prize crew to Key West, Florida, and there delivered into the charge of the United States marshal.

Very respectfully,

R. M. BERRY,
Commander U. S. Navy, Commanding.

(Endorsed:) Schooner "Paquete." Claim for prize shares by U. S. S. Castine. Filed Apr. 25, 1898. E. O. Locke, clerk.

7 In the District Court of the United States, Southern District of Florida.

THE UNITED STATES OF AMERICA
vs.
SLOOP PAQUETE. } Prize.

B. F. Tilley, being duly sworn, says: My name is Benjamin F. Tilley. I am an American, in U. S. Navy, on board U. S. S. Newport; that on the 25th day of April, A. D. 1898, the Spanish sloop Paquete was captured as a prize of war by the U. S. S. Castine, commanded by Robert Berry, commander U. S. N.; that said sloop Paquete was delivered by said Robert Berry to Rear Admiral Wm. T. Sampson (commanding North Atlantic squadron), together with the documents and other papers found on said sloop Paquete; that said sloop Paquete, with said documents and papers aforesaid, were turned over to affiant, as prize master, with instruction to proceed to Key West, Fla.; that said papers and documents this day delivered to G. Bowne Patterson, prize commissioner, at Key West are the identical documents and papers pertaining to the sloop Paquete delivered to him, and that they are in the same condition as when delivered to him.

B. F. TILLEY,
Commander, U. S. Navy.

Sworn to and subscribed before me this 25th day of April, A. D. 1898.

G. BOWNE PATTERSON,
U. S. Prize Commissioner.

(Endorsed:) U. S. *vs.* Schr. Paquete. Affidavit of prize master. Filed Apr. 25, 1898. E. O. Locke, clerk.

8 *Standing Interrogatories*

Established by the district court of the United States for the southern district of Florida, to be administered in prize causes in said court to all persons who may be produced as witnesses to be examined *in preparatorio.*

1st interrogate. What is your name, where were you born, and where have you lived for the last seven years? Where do you now live, and how long have you lived in that place? To what prince or State, or to whom are you, or have you ever been, a subject?

Are you a married man, and if married, where do your wife and family reside?

2d interrogate. Were you present at the time of taking and seizing the ship, or her lading, or any of the goods or merchandises concerning which you are now examined? Had the ship concerning which you are now examined any commission; what, and from whom?

3d interrogate. In what place, latitude or part, and when, was the said ship and goods concerning which you are now examined, taken and seized? Upon what pretence, and for what reasons were they seized? Into what port were they carried, and under what colors did the said ship sail? What other colors had you on board, and for what reason had you such other colors? Was any resistance made, at the time when the said ship was taken? and if yea, how many guns were fired? and by whom? and by what ship or ships were you taken? Was the ship or vessel by which you were captured, a ship of war, or a vessel acting without any commission, as you believe? Were any other and what ship in sight, at the time of the capture?

4th interrogate. What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of said vessel? Where did said commander take possession of her, at what time, and what was the name of the person who delivered the possession to the said master? Where doth he live? Where is the said master's fixed place of abode, and where doth he generally reside? How long has he lived there, where was he born, and of whom is he now a subject? Is he married? If yea, where does his wife and family reside?

5th interrogate. Of what burden is the vessel which has been taken? What was the number of her mariners, and of what country were the said seamen and mariners? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where?

6th interrogate. Had you, or any of the officers or mariners belonging to the ship or vessel, concerning which you are now examined, any, and what, part, share or interest in the said vessel or her lading? If yea, set forth who and what goods or interest you or they have? Did you belong to the said vessel, at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

7th interrogate. What is the name of the vessel? How long has she been so called? Do you know of any other name or names, and what are they, by which she has heretofore been called? Had she any passport or sea chart on board and from whom? To what ports and places did she sail, during her said voyage, before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? From what port, and at what time, particularly from the last clearing port, did the said ship sail, previously to the capture? Set forth all the ports to which she has sailed,

and at which she has touched and traded, during her whole voyage, out and home.

8th interrogate. What lading did the said vessel carry, at the time of her first setting sail on her last voyage, and what sort of lading and goods had she on board, at the time she was taken? When was the same put on board? Set forth the different species of lading, and the quantity of each sort. Has any part of the cargo of said vessel been unladen, since the commencement of her original voyage? If so, at what ports or places was it unladen? State the articles which were unladen.

9th interrogate. Who were the owners of the vessel, at the time when she was seized? How do you know that they were owners at that time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject? How long have the present owners been in possession? and of whom did they purchase?

10th interrogate. Was any bill of sale made, and by whom, to the aforesaid owners of said vessel? and if any such were made in what month and year, and where, and in the presence of what witnesses? Was any, and what, engagement entered into concerning the purchase, further than appears on the bill of sale? If yea, was it verbal or in writing? Where did you see it, and what has become of it?

11th interrogate. Was the said lading put on board at one port and at one time or at several ports and at several times, and at what ports, by name? Set forth what quantities of each sort of goods were shipped at each port.

12th interrogate. What are the names of the respective laders or owners, or consignees of said goods? What countrymen are they? Where do they now live and carry on their business? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk or benefit? Have any one of the said consignees or shippers, any and what interest in the said goods? If yea, whereon do you found your belief, that they have such interest? Do you verily believe that at the time of the lading the cargo and at the present time, and also if said goods shall be restored and unladen at the destined port, the goods did, do, and will belong to the same persons and to none others?

9 13th interrogate. How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colorable, or were any bills of lading signed, which were different in any respect from those which were on board the ship, at the time she was taken? What were the contents of such other bills of lading, and what became of them?

14th interrogate. Are there in the United States of America any bills of lading, invoices, letters or instruments relative to the ship and goods, concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the pur

port thereof, and when they were brought or sent to the United States.

15th interrogate. Was there any charter-party signed for the voyage, in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom, was such charter-party made? What were the contents of it?

16th interrogate. What papers, bills of lading, letters or other writings, were on board the ship, at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burnt, torn, thrown overboard, destroyed or cancelled, or attempted to be concealed, and when, and by whom, and who was then present?

17 interrogate. Has the ship, concerning which you are now examined, been, at any time, and when, seized as a prize, and condemned as such? If yea, set forth into what port she was carried, and by whom, and by what authority, or on what account she was condemned?

18th interrogate. Have you sustained any loss by the seizing and taking the ship, concerning which you are now examined? If yea, in what manner do you compute such your loss? Have you already received any indemnity, satisfaction or promise of satisfaction, for any part of the damage which you have sustained, or may sustain, by this capture and detention, and when, and from whom?

19th interrogate. Is the said ship, or goods, or any, and what part, insured? If yea, for what voyage is such insurance made, and at what premium, and when, and by what persons, and in what country was such insurance made?

20th interrogate. In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom? Or was the lader to take the chance of the market for the sale of his goods?

21st interrogate. Let each witness be interrogated of the growth, produce, and manufacture of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof.

22d interrogate. Whether all the said cargo, or any, and what part thereof, was taken from the shore or quay, or removed or transhipped from one boat, barque, vessel or ship, to another? From what, and to what shore, quay, boat, barque, vessel or ship, and when and where, was the same so done?

23d interrogate. Are there, in any other country, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers or documents, relative to the said ship, or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers or documents, and what are the contents? In whose possession are they, and do they differ from any of the papers on board, and in what particular do they differ?

24th interrogate. Were any papers delivered out of the said ship or vessel, and carried away in any manner whatsoever? And when, and by whom, and to whom, and in whose custody, possession or power, do you believe the same now are?

25th interrogate. Was bulk broken during the voyage in which you were taken, or since the capture, of the said ship? And when, and where, by whom, and by whose orders, and for what purpose, and in what manner?

26th interrogate. Were any passengers on board the aforesaid ship? Were any of them secreted, at the time of the capture? Who were the passengers, by name? Of what nation, rank, profession or occupation? Had they any commission? For what purpose, and from whom? From what place were they taken on board, and when? To what place were they finally destined, and upon what business? Had any, and which of the passengers, any, and what property or concern, or authority, directly or indirectly, regarding the ship and cargo? Were there any officers, soldiers or mariners secreted on board and for what reason were they secreted? Were any of the citizens of the United States on board, or secreted or confined, at the time of the capture? How long, and why?

27th interrogate. Were and are, all the passports, sea briefs, charter-parties, bills of sale, invoices and papers, which were found on board, entirely true and fair? Or are any of them false or colorable? Do you know of any matter or circumstances to affect their credit? By whom were the passports or sea briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath, or affirmation, of the persons therein described, or were they delivered to, or on behalf of the person or person- who appear to have been sworn, or to have affirmed thereto, without their ever having, in fact, make any such oath or affirmation? How long time were they to last? Was any duty or fee payable, and paid, for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea briefs were granted? And if not, where was the ship at the time? Had any person on board any let-pass, or letters of safe conduct? If yea, from whom and for what business? Had the said ship any license or passport from any foreign power or authority during the voyage? If so, state from whom been obtained, and for what purpose and use?

28th interrogate. Have you written or signed any letters or papers concerning the ship and her cargo, other than those found on board and delivered to her captors? If yea, what was their purport, to whom were they written and sent, and what is become of them?

29th interrogate. Towards what port or place was the ship steering her course, at the time of her being first pursued and taken? Was her course altered, upon the appearance of the vessel by which she was taken? Was her course, at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship's papers? Was the ship, before, or

at the time of her capture, sailing beyond or wide of the said place or port to which she was so destined by the said ship's papers? At what distance was she therefrom? Was her course altered, at any, and what time, and to what other port or place, and for what reason?

30th interrogate. By whom, and to whom, hath the said ship been sold or transferred, and how often? At what time, and at what place, and for what sum or consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? Or what security or securities have been given for the payment of the same, and by whom, and where do they live now? Do you know, or believe, in your conscience, such sale or transfer has been truly made and not for the purposes of covering or concealing the real property? Do you verily believe, that if the ship should be restored, she will belong to the persons now asserted to be the owners and to none others?

31st interrogate. What guns were mounted on board the ship, and what arms and ammunition were belonging to her? Why was she so armed? Were there on board any other, and what, arms and ammunition, and when and where — they put on board? and by whom, or by what authority, or for what purpose or destination, and on whose account were they put on board?

32d interrogate. What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined at the time of the capture?

11 In the District Court of the United States in and for the Southern District of Florida. In Admiralty.

THE UNITED STATES OF AMERICA
vs.
SPANISH SLOOP PAQUETE AND HER CARGO. } Prize.

Deposition of Juan Pazos, a witness produced, sworn, and examined *in preparatorio* on the 20th day of May, A. D. 1898, at the United States court-house, Key West, Florida, in said district, on the standing interrogatories established by the district court of the United States for the southern district of Florida, the said witness having been produced for the purpose of such examination in behalf of the captors of a certain ship or vessel called the "Paquete" and her cargo.

1. To the first interrogatory deponent answers:

My name is Juan Pazos. I was born in Spain. I have lived for seven years last past in Cuba. I now live in Havana, Cuba. I have lived there for 14 years. I am a Spanish subject. I am a married man. My wife and family live in Spain.

2. To the second interrogatory deponent answers:

I was present at the time of capture of the vessel. The vessel has no license or commission; she is a coasting vessel. I have a license

to fish, issued by the Spanish government. I gave it to the prize master.

12 3. To the third interrogatory deponent answers:

The vessel was captured April 25th, 1898, near Mariel, and we were going to Havana when captured. We were captured because of the war between Spain and the United States. We were carried into the port of Key West. The vessel sailed under the Spanish flag. We had no other colors on board. There was no resistence made at the time of the capture. The vessel which captured us was a U. S. warship. I do not know her name. There were some other ships in sight, but I do not know their names.

4. To the fourth interrogatory deponent answers:

I am the master of the vessel. I took possession of her at Havana on the 25th day of March, 1898. The owner, Justa Galvan, delivered possession to me.

5. To the fifth interrogatory deponent answers:

The vessel is of 25 tons burden; three mariners, including myself. I took them on board at Havana. I shipped them.

6. To the sixth interrogatory deponent answers:

None of the officers or crew had any interest in the vessel, but the crew and captain had an interest in cargo of fish, $\frac{2}{3}$ for the boat's crew and $\frac{1}{3}$ for the owner of the boat. I have known the boat for 5 years. I first saw her in Havana. She was built in Key West.

13 7. To the 7 interrogatory deponent answers:

The vessel is named the "Paquete Habana." I know she has been called by that name ever since I knew her. She had another name at one time. I think it was "Restless." This boat was a fishing smack and was engaged in running out of Havana for fishing trips.

8. To the 8th interrogatory deponent answers:

She had a cargo of fish when she was captured. We, the crew, caught the fish out of the sea. We had 40 kintals of fish on board at the time of the capture.

9. To the 9th interrogatory deponent answers:

The owner of the vessel is Justa Calvan. She lives in Havana, and is a Spaniard by birth. The present owner has been in possession for five years.

10. To the 10th interrogatory deponent answers:

I do not know anything about any bill of sale.

11. To the 11th interrogatory deponent answers:

The cargo was put on board as we caught the fish from the *the* ocean.

12. To the 12th interrogatory deponent answers:

I have already answer-d that question in my answer to the sixth interrogatory.

14 13. To the 13th interrogatory deponent answers:

There was no bill of lading.

14. To the 14th interrogatory deponent answers:

There are no bills of lading or documents or invoices in the U. S. relating to the vessel and her cargo.

15. To the 15th interrogatory deponent answers:
There was no charter-party for this voyage.
16. To the 16th interrogatory deponent answers:
There was only a crew list on board at the time of the capture, which I delivered to the prize master.
17. To the 17th interrogatory deponent answers:
The said ship has never before been captured or condemned as prize.
18. To the 18th interrogatory deponent answers:
I have sustained a loss by the capture of this ship because I owned a part of the cargo. I have not received any indemnity or promise of indemnity for any loss which I have sustained or might sustain by reason of this capture.
19. To the 19th interrogatory deponent answers:
The ship and cargo is not insured.
20. To the 20th interrogatory deponent answers:
In case we had arrived at our port of destination and the goods had been unladen they would have belonged to the persons named.
15 21. To the 21st interrogatory deponent answers:
The cargo was taken from Spanish waters.
22. To the 22nd interrogatory deponent answers:
The cargo was taken from the sea.
23. To the 23rd interrogatory deponent answers:
There are no bills of lading or invoices.
24. To the 24th interrogatory deponent answers:
The crew book was delivered to the prize master.
25. To the 25th interrogatory deponent answers:
The bulk was broken at Key West by the U. S. marshal.
26. To the 26th interrogatory depo-ent answers:
There were no passengers or other persons of any discription on the vessel at the time of the capture except the crew.
27. To the 27th interrogatory deponent answers:
She had no passports or sea briefs.
28. To the 28th interrogatory deponent answers:
I cannot write much. I have not *since* or written any letters or papers since I was captured.
29. To the 29th interrogatory deponent answers:
We were sailing toward Havana when we were captured. She was about 11 miles.
16 30. To the 30th interrogatory deponent answers:
I do not know anuthing about and bill of sale. If the vessel was released she would belong to the person before stated to be the owner.
31. To the 31st interrogatory deponent answers:
There were no cannons of and discription or arms or am-unition on board.
32. To the 32nd interrogatory deponent answers:
I have already stated all that I know concerning the true prop-e-ty and destination of the ship and cargo.

JUAN PAZOS.

Sworn to and subscribed before me May 20th, 1898.

J. M. PHIPPS,
Prize Commissioner.

(Endorsed:) Standing interrogatories. Filed May 26th, 1898. E. O. Locke, clerk.

17 In the District Court of the United States, Southern District of Florida.

UNITED STATES
vs.
SLOOP "PAQUETE" AND CARGO. } Prize.

This cause having come on to be heard upon the libel and proofs and testimony taken *in prepar-torio*, and all due proceedings having been had and proclamation having been duly made in open court, and no persons appearing to claim any portion of said sloop "Paquete" or cargo, and a decree *pro confesso* having been duly entered for default of claimants, and it appearing to the court that the said sloop "Paquete" and cargo are enemy's prope-ty and were attempting to violate the blockade of Havana, now, on motion of Joseph N. Stripling, attorney of the United States, it is ordered, adjudged, and decreed that the said sloop "Paquete" and cargo are condemned and forfeited to the United States as lawful prize of war.

It is further ordered that the marshal proceed to advertise and sell said vessel and cargo, after due and proper notice, at public auction, and make return of the sale and expenses to this court, and deposit the proceeds with the assistant treasurer of the United States at New York, subject to the order of this court, as required by law.

—— ——, *Judge.*

Key West, Florida, May 23rd, 1898.

(Endorsed:) U. S. district court, southern district of Fla. United States *vs.* Sloop "Paquete" and Cargo. Decree. Filed May 26, 1898. E. O. Locke, clerk.

18 The United States District Court, Southern District of Florida.

THE UNITED STATES
against
THE "PAQUETE HABANA." }

A motion having been made in behalf of the owners of the above-named vessel to open the decree of condemnation and sale herein and to allow a claim to be filed, and said motion having been argued by counsel for the vessel and for the Government, it is now—

Ordered that the decree of condemnation and sale heretofore made herein be vacated and set aside, and that leave be, and hereby

is, granted to the owners of the vessel to file a claim in the name of the master on or before May 30th, 1898.

Key West, May 28, 1898.

JAMES W. LOCKE,
U. S. District Judge.

(Endorsed:) U. S. district court, southern dist. of Fla. United States *vs.* Schr. Paqueta. Order sitting former decree aside. Filed May 28, 1898. E. O. Locke, clerk.

19 United States District Court, Southern District of Florida.

THE UNITED STATES OF AMERICA
against
THE "PAQUETE HABANA." } Claim.

And now comes Juan Pasos, master and lawful bailee of the fishing boat "Paquete Habana," and intervening for the interest of Justa Galban, widow, in the said fishing boat, her tackle, apparel, and furniture, and in her fish, as the same are attached as prize at the instance of the United States, he claims the same accordingly; and the said claimant avers that before and at the time of the alleged capture of the said vessel the above-named "Justa Galban," widow, was the *bona fide* owner of the said vessel, her tackle, apparel, and furniture, and of one-third of said fish, and that the other two-thirds of said fish belonged to this claimant and the other members of the crew, all of whom are Cubans, who prior to the recognition of Cuban independence were Spanish subjects, and that no other person is the owner of said vessel or fish, and that the claimant is the lawful bailee of both the vessel and fish. He further avers that said vessel and fish under the general law and the proclamation of the President of April 26th, 1898, were privileged and exempt from capture and condemnation as a fishing vessel, with her catch, and he denies that the vessel and fish are lawful prize of war.

Wherefore we pray leave to defend accordingly and to show cause why the vessel and fish at the time of said capture were not liable to seizure and condemnation as prize of war.

JUAN PASOS.

Sworn to and subscribed before me this 28th day of May, 1898.

J. OTTO, *D'y Clerk.*

CONVERS & KIRKLIN,
Proct. for Claimants.

20 United States District Court, Southern District of Florida.

THE UNITED STATES OF AMERICA
against
THE "PAQUETE" HABANA. } Test Affidavit.

SOUTHERN DISTRICT OF FLORIDA, *ss:*

Juan Pasos, being duly sworn, duly say*s:*

1. I am master of the fishing boat Paquete Habana and lawful bailee of the vessel and her fish. The vessel belongs to Justa Galban, widow, of Havana, a native-born Cuban domiciled in Cuba at the time of the recognition of the independence of the Cuban people by Congress, and is used exclusively in the coast waters of Cuba for catching small fish. Her keel length is about 43 feet and her tonnage about 25 tons. The fishing is done on shares, one-third of the catch belonging to the owner and two-thirds to the crew. The fish now on board are thus owned. They are kept and sold alive.

2. I left Havana on the last trip March 25th and proceeded to Cape San Antonio, on the coast of Cuba, in coast waters between the reefs. We fished there 25 days and then started back to Havana with the catch. We were stopped by the blockading squadron near Havana on April 25th, 1898. Prior to said time we were unaware of the existence of war or of any blockade. We were stopped by the United States ship "Castine" and brought into Key West as prize of war. No effort*s* was made by the vessel to run the blockade after we learned of its existence.

21 3. I have been master of the said vessel for 4 years; then I was off her 2 years, and captain again 1 month. During that time the vessel has carried no cargo save her catches of fish, and has carried no passengers.

Her crew consists of 3 persons, including the captain. She is of sloop rig, and has one mast.

JUAN PASOS.

Sworn to before me this 28th day of May, 1898.
J. OTTO, *D'y Clerk.*

(Endorsed:) U. S. district court, southern dist. of Fla. U. S. *vs.* Paquete Habana. Claim and test affidavit. Convers & Kirlin, proctors for cl't. Filed May 30, 1898. E. O. Locke, clerk.

22 In the District Court of the United States for the Southern District of Florida.

THE UNITED STATES
vs.
SLOOP "PAQUETE" AND CARGO. } Prize.

This cause having come on to be heard upon the libel and proofs and testimony taken *in preparatorio*, and all due proceedings having been had, and proclamations having been duly made in open court,

and Juan Pasos having appear-d and claimed said sloop "Paquete" and cargo upon the grounds of her being a fishing vessel and not liable to capture, and the case being fully heard, and it appearing to the court that the said sloop "Paquete" and cargo are enemy's property—

Now, on motion of Joseph N. Stripling, attorney of the United States, it is ordered, adjudged, and decreed that the said sloop "Paquete" and cargo be condemned and forfeited to the United States as lawful prize of war, said claim notwithstanding.

And it is further ordered that the marshal proceed to advertise and sell said vessel and cargo, after due and proper notice, at public auction, and make return of the sale and expenses to this court, and deposit the proceeds with the assistant treasurer of the United States at New York, as required by law.

JAMES W. LOCKE, *Judge.*

Key West, Fla., May 30th, 1898.

(Endorsed:) U. S. district court, southern dist. of Fla. United States *vs.* Sloop Paquete. Decree of condemnation. Filed May 30, 1898. E. O. Locke, clerk.

23 In the District Court of the United States, Southern District of Florida.

THE UNITED STATES *vs.* SLOOP "PAQUETE" AND CARGO. } Prize.

This cause coming on to be heard and a decree *pro confesso* having been entered (and final decree of condemnation and forfeiture pronounced)—

Now, on motion of Convers and Kirlin, said decree is set aside, and — is permitted to file a claim for said vessel and cargo on account of said vessel being a fishing vessel and therefore not liable to seizure; and said case again coming on to be heard upon such claim, and the court not being satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure, it is ordered, adjudged, and decreed that said vessel and cargo of fish be condemned and forfeited and sold.

JAMES W. LOCKE, *Judge.*

Key West, Florida, May 30th, 1898.

(Endorsed:) U. S. district court, southern dist. of Fla. United States *vs.* Sloop Paquete. Decree. Filed May 30, 1898. E. O. Locke, clerk.

24 Whereupon a writ of *venditioni exponas* was issued to the marshal of said district, commanding him forthwith to sell at public auction the said prize vessel "Paquete Habana," her tackle, &c., and to deposit the proceeds thereof with the assistant treasurer of the United States at New York, to the credit of said court.

Which writ was afterwards by the marshal returned, showing the proceeds of said vessel to be the sum of four hundred and ninety dollars, which sum was by the marshal deposited as commended.

25 United States District Court, Southern District of Florida.

The President of the United States to John F. Horr, marshall of said district, Greeting:

Whereas the fishing smack Paquete Habana has been libelled in said court and is now in custody of this court by virtue of a writ of attachment issued out of said court; and whereas such proceedings have been had — the said vessel and cargo have been ordered by decree of said court to be sold: Now, therefore, you are hereby commanded after due notice to sell at public auction the said fishing smack "Paquete Habana" and make return thereof to this court and deposit the proceeds of sale in the assistant treasury of the United States at New York to be disposed of according to law.

Witness the Honorable James W. Locke, judge of said court, at Jacksonville, this 26th day of May, A. D. 1898.

[SEAL.] E. O. LOCKE, *Clerk.*

(*Marshall's Return.*)

Receive- the within writ this 26th day of May, 1898, and executed same by selling said vessel "Paquete Habana" at public auction for $490.00 and deposited the said sum with the assistant treasurer of the United States, as directed therein.

Sep. 28th, 1898.

JOHN F. HORR,
U. S. Marshall.

(Endorsed:) United States *vs.* Smack "Paquete." *Vend. ex.* Issued May 26th, 1898. Returned & filed Sep. 28th, 1898. E. O. Locke, clerk.

26 *Statement.*

"Paquete Habana."

1899.			
July —.	Deposited proceeds sale with ass't treas. at N. Y...		490
Aug. 11.	Drew a/c watchman.....	224.00	
"	" prize com.....	28.02	
"	" interpu-ter	5.00	
"	" marshal...	68.69	
"	" clerk	42.00	

27 In the District Court of the United States in and for the Southern District of Florida. In Admiralty.

THE UNITED STATES OF AMERICA
vs.
SPANISH SLOOP "PAQUETE" OF HAVANA. } Prize.

Deposition of W. V. Bronough, a witness produced, sworn, and examined on the 31 day of May, 1898, on board the U. S. S. "Castine," on the standing interrogatories established by the district court of the United States in and for the southern district of Florida, the said witness having been produced for the purpose of such examination in behalf of the claim of the U. S. S. "Castine" for a share in said prize and her cargo.

1. My name is W. V. Bronough; my age, 42 years; my rank, lieutenant U. S. Navy, and I am now serving as watch officer of the U. S. S. "Castine."

2. At the time of the capture of the "Paquete" I was in the U. S. S. "Castine," serving as watch officer.

3. Shortly before 6 p. m. of the 25th day of April, 1898, this vessel, at the time being engaged in the blockade of the coast of Cuba and near Mariel, overhauled and captured the Spanish sloop "Paquete," of Havana.

At about the same time the U. S. S. "Newport," then being within signal distance of this vessel, captured and took possession of the Spanish schooner "Pireneo" of Havana.

The "Newport" at the time of these captures was a couple of miles to the northward of Mariel, Cuba.

After the captures of the above-mentioned vessels the U. S. S. "Castine" communicated ver*abl*-y with the U. S. S. "Newport," which vessel took both schooner and sloop in tow for Key West, Florida.

28 The sloop "Paquete" was manned by a prize crew detailed from the "Castine."

4. The U. S. S. "Newport" was within signal distance at the time the "Paquete" was captured.

By the word- "signal distance" I mean a distance in which all flag signals could have been made out.

5. At the time the prize was boarded and possession taken of her the "Castine" was about two miles to the northward of Mariel, Cuba.

6. See answer to No. 5.

7. See answer to No. 5.

8. After capture was made by this vessel verbal communication with the U. S. S. "Newport" was had.

9. See answer to No. 5.

10. All facts stated above.

W. V. BRONOUGH,
Lieutenant U. S. Navy.

Sworn to and subscribed before me May 31, 1898.

R. M. BERRY,
Commander U. S. Navy, Commanding
Officer U. S. S. "Castine."

(Endorsed:) "Paqueta." Filed Jun- 15, 1898. E. O. Locke, clerk.

29 In the District Court of the United States in and for the Southern District of Florida. In Admiralty.

THE UNITED STATES OF AMERICA
vs.
SPANISH SLOOP "PAQUETE" OF HAVANA. } Prize.

Deposition of Henry Morrell, a witness produced, sworn, and examined on the 31st day of May, 1898, on board the U. S. S. "Castine," on the standing interrogatories established by the district court of the United States in and for the southern district of Florida, the said witness having been produced for the purpose of such examination in behalf of the claim of the U. S. S. "Castine" for a share in said prize and her cargo.

1. My name is Henry Morrell; my age, 44 years; my rank, lieutenant U. S. *S.* Navy, and I am now serving as navigator of the U. S. S. "Castine."

2. At the time of the capture of the "Paquete" I was in the U. S. S. "Castine," serving as navigator.

3. Shortly before 6 p. m. of the 25th of April, 1898, this vessel, at the time being engaged in the blockade of the coast of Cuba and near Mariel, overhauled and captured the Spanish sloop "Paquete" of Havana.

At about the same time the U. S. S. "Newport," then being within signal distance of this vessel, captured and took possession of the Spanish schooner "Pireneo" of Havana.

The "Newport" at the time of these captures was a couple of miles to the northward of Mariel, Cuba.

After the capture of the above-mention- vessel the U. S. S. "Castine" communicated verbally with the U. S. S. "Newport," which vessel took both schooner and sloop in tow for Key West, Florida.

30 The sloop "Paquete" was manned by a prize crew detailed from the "Castine."

4. The U. S. S. Newport was within signal distance at the time the "Paquette" was captured.

By the words "signal distance" I mean a distance in which all flag signals could have been made out.

5. At the time the prize was boarded and possession taken of her the "Castine" was about two miles to the northward of Mariel, Cuba.

6. See answer to No. 5.

7. See answer to No. 5.

8. After capture was made by this vessel verbal communication with the U. S. S. "Newport" was had.
9. See answer to No. 5.
10. All facts stated above.

H. MORRELL,
Lieutenant U. S. Navy.

Sworn to and subscribed before me May 31, 1898.
R. M. BERRY,
Commander U. S. Navy, Commanding Officer U. S. S. "Castine."

(Endorsed:) "Paquette." Filed Jun- 15, 1898. E. O. Locke, clerk.

31 In the District Court of the United States in and for the Southern District of Florida. In Admiralty.

THE UNITED STATES OF AMERICA
vs.
SPANISH SLOOP PAQUETE. } Prize.

Deposition of B. F. Tilley, a witness produced, sworn, and examined on the 15th day of June, 1898, on board the U. S. S. Newport, on the standing interrogatories established by the United States court in and for the southern district of Florida, the said witness having been produced for the purpose of such examination in behalf of the claim of the U. S. S. Newport for a share in said prize and her cargo.

1. To the first interrogatory deponent answers:
My name is B. F. Tilley, commander U. S. Navy; commanding U. S. S. Newport, North Atlantic station; block-ing ports on north coast of Cuba.
2. I was attached to and on board the U. S. S. Newport, commanding same.
3. About 6 p. m., April 25th, 1898, the U. S. S. Castine took as prize sloop Paquette. The Newport was engaged at that time in taking as prize schooner Pironeo. The Paquete was first chased by the Newport, but as it was considered possible for the Castine to capture her the Newport was headed for the Pironeo. The Newport towed the Paquetee to Key West.
4. The Newport and Castine were in company, and the Newport left to chase the sails.
32 5. Within easy reading of ordinary flag signals.

B. F. TILLEY.

Sworn to and subscribed before me this June 15th, 1898.
J. H. BULL,
Lieutenant U. S. N., Executive Officer U. S. S. Newport.

(Endorsed:) Filed Jun- 15th, 1898. E. O. Locke, clerk.

33 In the District Court of the United States in and for the Southern District of Florida. In Admiralty.

THE UNITED STATES OF AMERICA
vs.
SPANISH SLOOP PAQUETE. } Prize.

Deposition of J. H. Bull, a witness produced, sworn, and examined on the 15th day of June, 1898, on board the U. S. S. Newport, on the standing interrogatories established by the district court of the United States in and for the southern district of Florida, the said witness having been produced for the purpose of such examination in behalf of the claim of U. S. S. Newport for a share in said prize and her cargo.

1. To the first interrogatory deponant answers:

My name is J. H. Bull; lieutenant U. S. Navy, executive officer U. S. S. Newport, North Atlantic station; blockading ports on north coast of Cuba.

2. To the second interrogatory deponant answers:

I was attached to and on board the U. S. S. Newport, executive officer of same.

3. About 6 p. m., April 25th, 1898, the U. S. S. Castine took as prize the sloop Paquete. The Newport was engaged at the time in taking as prize the schooner Pironeo. The Paquete was first chased by the Newport, but as it was considered possible for the Castine to capture her the Newport was headed for the Pironer. The Newport towed the Paquete to Key West.

4. The Newport and Castine were in company, and the Newport left to chase the sails.

34 5. Within easy reading of ordanary flag signals.

J. H. BULL.

Sworn to and subscribed before me this June 15th, 1898.

B. F. TILLEY,
Commander U. S. Navy, Com'd'g U. S. S. Newport.

(Endorsed:) Filed June 15th, 1898. E. O. Locke, clerk.

35 United States District Court, Southern District of Florida.

THE UNITED STATES, Libellant, Appellees,
against
THE FISHING SMACK PAQUETE HABANA; JUAN PASOS, Claimant, Appellant. } Prize.

And now comes Juan Pasos, claimant, —, considering himself ag-rieved by the decision and decree of condemnation herein and alleging error in the said decree, appeals therefrom to the Supreme Court of the United States. He presents herewith an assignment of errors complained of and a bond for costs, with surety, in the sum approved by the court, and thereupon prays that his said appeal may be allowed, and that the record and all proceedings herein may

be duly certified to the Supreme Court of the United States in accordance with the rules and practice in such cases made and provided, to the end that the said appeal may be heard and determined by the said court.

Dated August 15th, 1899.

JUAN PASOS, *Claimant,*
By CONVERS & KERLIN,
His Proctors.

CONVERS AND KERLIN,
Proctors for Appellant.

Upon reading the foregoing notice and prayer of appeal and the assignment of errors and bond on appeal, it is ordered that the appeal of the claimant, Juan Pasos, be, and the same is hereby, allowed.

Dated August 15th, 1899.

JAMES W. LOCKE, *U. S. Judge.*

36 United States District Court, Southern District of Florida.

THE UNITED STATES, Appellee,
against
THE FISHING SMACK PAQUETE HABANA; JUAN PASOS, Claimant, Appellant. } Prize.

Assignment of Error.

The claimant assigns error to the final decision and decree of the United States district court for the southern district of Florida, herein as follows:

First. For that the court omitted and refused to hold that the "Paquete Habana" was not subject to condemnation as lawful prize of war.

Second. For that the court omitted and refused to find that the vessels, whilst engaged in fishing, as disclosed by the record, were exempt from capture under the terms of the President's proclamation dated April 26th, 1898, providing that the war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, in accordance with — the fishing vessels in the situation of the Paquete Habana at the time of her capture are exempt from capture as prize.

Third. For that the court omitted and refused to hold that the vessels and cargoes were the property of Cubans, whose freedom and independence was recognized by the joint resolution of Congress approved April 20th, 1898, and entitled accordingly to
37 exemption from capture as the property of neutrals, or persons entitled to the rights, privileges, and immunities of neutrals.

Fourth. For that the court omitted and refused to allow further proofs of the grounds for the exemption from capture set forth in the claim and test affidavits.

CONVERS & KIRLIN,
Proctors for Appellant.

Endorsed: Order allowing appeal and assignment of errors. Filed Aug. 18th, 1899. E. O. Locke, clerk.

38 District Court of the United States, Southern District of Florida.

THE UNITED STATES OF AMERICA
vs.
FISHING SMACK "PAQUETE HABANA."

Know all men by these presents that we, Juan Pasos, as principal, and the American Surety Company of New York, of 100 Broadway, New York city, New York, and also represented by manager and attorney at Key West, Florida, as surety, are held and firmly bound unto The United States of America, the plaintiffs in the above-entitled action, in the sum of two hundred and fifty dollars, to be paid to the United States of America or their assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fourteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas the above-bounden Juan Pasos has appealed to the Supreme Court of the United States from the decree of the United States district court, southern district of Florida, bearing date the 30th day of May, 1898, in a suit in which The United States of America are plaintiffs and the Fishing Smack "Paqueta Habana" is defendant:

Now, therefore, the condition of this obligation is such that if the above-bounden appellant, Juan Pasos, shall prosecute said appeal with effect and pay all costs which may be awarded against
39 him as said appellant if the appeal is not sustained, then this obligation shall be void; otherwise the same shall remain in full force and effect.

JUAN PASOS,
By CONVERS & KERLIN, *Proctors.*
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK.
By DAVID B. SICKELS, *Vice-President.*
SAMUEL S. PERRY, *Attorney.*

[Three documentary stamps, 4, ½, 3.]

STATE AND COUNTY OF NEW YORK, *ss:*

On this 14th day of August, 1899, before me personally appeared David B. Sickels, vice-president of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instru-

ment; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order, and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by law; and the said David B. Sickels further said that he was acquainted with Samuel S. Perry, and knew him to be one of the attorneys of said corporation; that the signature of said Samuel S. Perry subscribed to the said instrument is in the genuine handwriting of the said Samuel S. Perry, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said David B. Sickels, vice-president.

[SEAL.] K. J. PIERCEY,
Notary Public, Kings Co.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk Co-.

40 At a regulary quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be, and they hereby are, and each of them is hereby authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company, in the performance of contracts other than insurance policies and executing or guaranteeing its business of guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Samuel S. Perry, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolutions.

Given under my hand and the seal of the company, at the city of New York, this 14th day of Aug., 1899.

[SEAL.] SAMUEL S. PERRY, *Attorney.*

American Surety Company of New York.

Incorporated April 14th, 1884.

General offices, 100 Broadway.

Financial Statement June 30th, 1899.

Resources:

Real estate and improvements	$3,013,930.66
Stocks and bonds	1,107,979.10
Bills receiv	114,797.40
Cash in banks and offices	815,776.94
Premiums in course of collection	192,736.02
Accrued interest and rents	38,466.51
	$5,283,686.63

Liabilities:

Bills and accounts payable	$49,129.13
Claims in process of adjustment	209,907.64
41 Premiums reserve requirement	626,233.97
Undivided profits	898,415.89
Surplus	1,000,000.00
Capital stock	2,500,000.00
	$5,283,686.63

STATE OF NEW YORK, *County of New York*, } ss:

David B. Sickels, being duly sworn, says that he is vice-president of the American Surety Company of New York; that said company is a corporation duly created, existing, and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of the said State applicable to said company, and is duly qualified to act as surety under such laws; that said company has also duly complied with and is duly qualified to act as surety under the act of Congress of August 13th, 1894, entitled "An act relative to recognizances, stipulations, bonds, and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of assets and liabilities of said company as rendered pursuant to section 4 of said act of Congress; that said American Surety Company is worth $1,000.00 over and above all its debts and liabilities and such exemptions as may be allowed by law.

DAVID S. SICKELS.

Subscribed and sworn before me this 14th day of Aug., 1899.

[SEAL.] K. J. PEIRCEY,
Notary Public.

Endorsed: Bond on appeal. The within bond approved as to amount and sufficiency of surety. James W. Locke, judge. Filed Aug. 18, 1899. E. O. Locke, clerk.

42 District Court of the United States, Southern District of Florida.

THE UNITED STATES
vs.
THE SMACK "PAQUETTE." } Prize.

Claimants of the cargo herein having appealed from the decree of condemnation herein rendered to the Supreme Court of the United States, it is ordered that the clerk of this court transmit to the Supreme Court of the United States for inspection, together with the apostles herein, the original documents of the ship and cargo in his official keeping, the same to be returned to this court when no longer required.

JAMES W. LOCKE, *Judge.*

August 28th, 1899.

43 UNITED STATES OF AMERICA, *ss:*

To United States, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., on Sept. 21st, 1899, pursuant to an order allowing appeal entered and filed in the clerk's office of the district court of the United States for the southern district of Florida, wherein the Spanish Smack "Paqueta Habana," Juan Pasos, claimant, is appellant and The United States of America, libellant, is appellee, to show cause, if any there be, why the judgment against the said "Paqueta Habana" mentioned, entered on the thirtieth day of May, 1898, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable James W. Locke, judge district court United States, this 22nd day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] JAMES W. LOCKE,
Judge U. S. District Court, Southern District of Florida.

Endorsed: Spanish Smack "Paqueta Habana," appellant, *vs.* The United States, appellee. Citation. Filed Sept. 1st, 1899. E. O. Locke, clerk.

Marshal's Return.

Received this citation Aug. 25th, 1899, and executed same by service on H. H. Buckman, ass't United States attorney, of certified copy thereof, at same time exhibiting to him this the original,

at Jacksonville, Fla., the 1st day of Sept., A. D. 1899, the United States attorney being absent from the city on official business.

JOHN F. HORR, *U. S. Marshal*,
By KATHARINE PILLSBURRY,
Office Deputy.

44 In the United States District Court, Southern District of Florida.

THE UNITED STATES OF AMERICA
vs.
SPANISH "PAQUETE HABANA" AND CARGO. } In Prize.

I, Eugene O. Locke, clerk of the above-mentioned court, hereby certify the foregoing pages, numb-red from one to forty-three, inclusive, constitute a complete transcript of the record of the proceedings, proofs, and assignment of errors in the above-entitled cause, as appears from record and files of this office.

Seal District Court of the United States, Southern District of Florida.

Witness my hand and the seal of this said court this second day of September, 1899, at Jacksonville, in said district.

EUGENE O. LOCKE, *Clerk*,
By LOUIS STARKE, *Deputy.*

45 UNITED STATES OF AMERICA, *ss*:

To United States, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., on Sept. 21, 1899, pursuant to an order allowing appeal entered and filed in the clerk's office of the district court of the United States for the southern district of Florida, wherein the Spanish Smack "Paquete Habana," Juan Pasos, claimant, is appellant and The United States of America, libellant, is appellee, to show cause, if any there be, why the judgment against the said "Paquete Habana" mentioned, entered on the thirtieth day of May, 1898, should not be corrected and speedy justice should not be done to the parties on that behalf.

Seal District Court of the United States, Southern District of Florida.

Witnfss the Hon. James W. Locke, judge district court United States, this 22nd day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES W. LOCKE,
Judge U. S. Dist. Court, Southern District of Florida.

[Endorsed:] Mar. d'k't, 327. United States district court, so. dist. Fla. Spanish Smack "Paquete Habana," appellant, *vs.* The United States, appellee. Citation. Filed Sep. 1, 1899. E. O. Locke, clerk.

Received this citation Aug. 25, 1899, and executed same by service on H. H. Buckman, ass't United States attorney, of certified copy thereof, at same time exhibiting to him this the original, at Jacksonville, Fla., the 1st day of Sept., A. D. 1899, the United States attorney being absent from the city on official business.

JOHN F. HORR, *U. S. Marshal,*
By KATHARINE PILLSBURY,
Office Deputy.

Endorsed on cover: File No., 17,509. S. Florida D. C. U. S. Term No., 395. The Spanish Smack "Paquete Habana," Juan Pasos, claimant, appellant, *vs.* The United States. Filed September 9th, 1899.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 365.

THE SPANISH SCHOONER "LOLA," TOMAS BETANCOURT, CLAIMANT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

FILED SEPTEMBER 9, 1899.

(17,510.)

(17,510.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 396.

THE SPANISH SCHOONER "LOLA," TOMAS BETANCOURT CLAIMANT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 9, 1899.

1 In the District Court of the United States, Southern District of Florida.

UNITED STATES OF AMERICA
vs.
THE LOLA. } Prize.

To the Honorable James W. Locke, judge of the district court of the United States for the southern district of Florida:

The libel of Joseph N. Stripling, attorney of the United States for the southern district of Florida, who libels for the United States and for all parties in interest against the sailing vessel "Lola," her tackle, apparel, furniture, and cargo, in a cause of prize alleges—

That pursuant to instructions from the President of the United States H. W. Lyon, commander of the United States Navy, in and with the United States ship of war the "Dolphin," her officers and crew, did, on the 27th day of April, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas as a prize of war the said sailing vessel "Lola" with a valuable cargo on board of the same, and that the said ship and cargo have been brought into the port and harbor of Key West, in the State of Florida, where the same now are, within the jurisdiction of this court, and that the said vessel and cargo are lawful prize of war and subjected to be condemned and forfeited to the United States as such.

2 Wherefore the said attorney prays that all persons having or claiming any interest in said vessel or cargo may, by the proper process of this court, be duly notified of the allegations and prayers of this libel and cited to appear and claim the same; that the nature, amount, and value of said cargo may be determined, and that on proper proofs being taken and heard and that all due proceedings being had the said "Lola," together with her tackle, apparel, furniture, and cargo, may on the final hearing of this cause by the definitive sentence and decree of this court be condemned, forfeited, and sold as a prize of war and the proceeds distributed according to law.

J. N. STRIPLING,
U. S. Attorney, S. D. of Fla.

Let attachment and monition be issued as prayed, returnable Wednesday, day of 18th May, A. D. 1898, at 10.30 a. m.

Entered as of course.

E. O. LOCKE, *Clerk*,
By J. OTTO, *Deputy Clerk*.

(Endorsed:) In the district court of the United States, southern district of Florida. United States *vs.* Sailing Vessel Lola and Cargo. Libel. Filed Apr. 30, '98. E. O. Locke, clerk.

3 UNITED STATES OF AMERICA:

District Court of the United States, Southern District of Florida.

The President of the United States to John F. Horr, Esq., the marshal of the United States for the southern district of Florida, Greeting:

You are hereby commanded forthwith to attach, seize, and take into custody the Spanish schooner Lola and cargo, wheresoever the same may be found within your precincts, and the same you are required to keep until the further order of this court, to answer the claim of the United States for prize; and how you shall have executed this precept make known to the said court, at the court-rooms, in Key West, the 18th day of May, A. D. 1898, at 10.30 o'clock a. m., by a return hereof, with your certificate of execution hereon written.

Witness the Honorable James W. Locke, judge of the said court, at Key West, in said district, this 30th day of April, in the [SEAL.] year of our Lord one thousand eight hundred and ninety-eight, and Independence of the United States the hundred and twenty-first.

E. O. LOCKE, *Clerk*,
By J. OTTO, *Deputy Clerk*.

(Endorsed:) U. S. district court, southern dist. of Fla. United States *vs.* Schr. Lola. Attachment. Filed May 2, 1898. E. O. Locke, clerk.

(*Return of Marshal.*)

Received the within writ of attachment Apr. 30, 1898, and duly executed same as within commanded by attaching and taking unto custody the within-named Spanish schooner "Lola."

JOHN F. HORR,
U. S. Marshal, So District of Fla.

4 UNITED STATES OF AMERICA:

District Court of the United States, Southern District of Florida.

The President of the United States to John F. Horr, Esq., the marshal of the United States for the southern district of Florida, Greeting:

Whereas, on the 30th day of April, A. D. 1898, the United States of America, by their proctor, Joseph N. Stripling, Esq., filed in the office of the clerk of said court their libel against the Spanish sailing vessel "Lola" in a cause of prize, civil and maritime, alleging in substance that she was captured by the U. S. S. Dolphin Apr. 27th, 1898, as a prize of war;

Wherefore the said libellant pray that the usual process of attachment may issue against the said sailing vessel Lola, that monition may issue citing all parties having or claiming any interest or prop-

e-ty in said sailing vessel Lola to appear and answer upon oath all and singular the matters aforesaid, and that this court will be pleased to decree to the libellant the proceeds of said prize for service in said cause, and that the said Lola may be condemned and sold to pay said prize money, with costs, charges, and expenses, and that the libellant may have such other and further relief in the premises as in law and justice *he* may be entitled to receive; and whereas the judge of said court has ordered that attachment and monition be issued as prayed, returnable on Wednesday, the 18th day of May, A. D. 1898:

Now, therefore, you are hereby commanded forthwith to cite and admonish all persons whomsoever having any right, title, claim, or interest in or to the said Lola to appear at an admiralty session of said court, to be held in the court-rooms of said court, at Key West, in said district, on Wednesday, 18th day of May, A. D. 1898, at 10.30 o'clock in the forenoon of that day, to show cause, if any they have, why prize money should not be decreed according to the prayer of the libellant, and to attend upon every session of said court from that time held until a final decree shall be rendered in the premises.

And this you are required to do by serving on the master of said vessel a true copy hereof and by posting two other such copies in the most public places of Key West.

And how you shall have executed this precept make known to this court by a return hereof on or before the 18th day of May, aforesaid, with your certificate of execution hereon written.

Witness the Hon. James W. Locke, judge of said court, at Key West, in said district, this 30th day of April, in the [SEAL.] year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the hundred and twenty-first.

E. O. LOCKE, *Clerk*,
By J. OTTO, *Dep'y Clerk*.

(Endorsed:) U. S. district court, southern dist. of Fla. United States *vs.* Schr. Lola. Monition. Filed May 2, 1898. E. O. Locke, clerk.

(*Return of Marshal.*)

Receive- the within writ of monition April 30, 1898, and duly executed the same as within commanded by reading the original to master and posting 2 copies, as within commanded.

JOHN F. HORR,
U. S. Marshal, So. Dist. of Fla.

6 In the District Court of the United States, Southern District of Florida.

SCHR. LOLA. Prize.

Gustav Sablestrom, being duly sworn, says: My name is Gustav Sablestrom. I am quartermaster U. S. Navy, on board U. S. S.

Dolphin; that on the 27th day of April, A. D. 1898, the Spanish Sch. Lola was captured as a prize of war by the U. S. S. Dolphin, commanded by H. W. Lyon; that said Sch. Lola was delivered by said H. W. Lyon to Rear Admiral Wm. T. Sampson (commanding North Atlantic squadron), together with the documents and other papers found on said Sch. Lola; that said Sch. Lola, with said documents and papers aforesaid, were turned over to affiant, as prize master, with instruction to proceed to Key West, Florida; that said papers and documents this day delivered to J. M. Phipps, prize commissioner, at Key West, Florida, are the identical documents and papers pertaining to the said —— delivered to him, and that they are in the same condition as when delivered to him.

GUSTAV SABLESTROM.

Sworn to and subscribed before me this 30th day of April, A. D. 1898.

J. M. PHIPPS,
Prize Commissioner.

(Endorsed:) Sch. Lola. Prize. Aff't prize master. Filed Apr. 30, 1898. E. O. Locke, clerk.

7 *Standing Interrogatories*

Established by the district court of the United States for the southern district of Florida, to be administered in prize causes in said court to all persons who may be produced as witnesses to be examined *in preparatorio.*

1st interrogate. What is your name, where were you born, and where have you lived for the last seven years? Where do you now live, and how long have you lived in that place? To what prince or State, or to whom are you, or have you ever been, a subject? Are you a married man, and if married, where do your wife and family reside?

2d interrogate. Were you present at the time of taking and seizing the ship, or her lading, or any of the goods or merchandises concerning which you are now examined? Had the ship concerning which you are now examined any commission; what, and from whom?

3d interrogate. In what place, latitude or part, and when, was the said ship and goods concerning which you are now examined, taken and seized? Upon what pretence, and for what reasons were they seized? Into what port were they carried, and under what colors did the said ship sail? What other colors had you on board, and for what reason had you such other colors? Was any resistance made, at the time when the said ship was taken? and if yea, how many guns were fired? and by whom? and by what ship or ships were you taken? Was the ship or vessel by which you were captured, a ship of war, or a vessel acting without any commission, as you believe? Were any other and what ship in sight, at the time of the capture?

4th interrogate. What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of said vessel? Where did said commander take possession of her, at what time, and what was the name of the person who delivered the possession to the said master? Where doth he live? Where is the said master's fixed place of abode, and where doth he generally reside? How long has he lived there, where was he born, and of whom is he now a subject? Is he married? If yea, where does his wife and family reside?

5th interrogate. Of what burden is the vessel which has been taken? What was the number of her mariners, and of what country were the said seamen and mariners? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where?

6th interrogate. Had you, or any of the officers or mariners belonging to the ship or vessel, concerning which you are now examined, any, and what, part, share or interest in the said vessel or her lading? If yea, set forth who and what goods or interest you or they have? Did you belong to the said vessel, at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

7th interrogate. What is the name of the vessel? How long has she been so called? Do you know of any other name or names, and what are they, by which she has heretofore been called? Had she any passport or sea chart on board and from whom? To what ports and places did she sail, during her said voyage, before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? From what port, and at what time, particularly from the last clearing port, did the said ship sail, previously to the capture? Set forth all the ports to which she has sailed, and at which she has touched and traded, during her whole voyage, out and home.

8th interrogate. What lading did the said vessel carry, at the time of her first setting sail on her last voyage, and what sort of lading and goods had she on board, at the time she was taken? When was the same put on board? Set forth the different species of lading, and the quantity of each sort. Has any part of the cargo of said vessel been unladen, since the commencement of her original voyage? If so, at what ports or places was it unladen? State the articles which were unladen.

9th interrogate. Who were the owners of the vessel, at the time when she was seized? How do you know that they were owners at that time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject? How long have the present owners been in possession? and of whom did they purchase?

10th interrogate. Was any bill of sale made, and by whom, to the aforesaid owners of said vessel? and if any such were made in what

month and year, and where, and in the presence of what witnesses? Was any, and what, engagement entered into concerning the purchase, further than appears on the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what has become of it?

11th interrogate. Was the said lading put on board at one port and at one time or at several ports and at several times, and at what ports, by name? Set forth what quantities of each sort of goods were shipped at each port.

12th interrogate. What are the names of the respective laders or owners, or consignees of said goods? What countrymen are they? Where do they now live and carry on their business? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk or benefit? Have any one of the said consignees or shippers, any and what interest in the said goods? If yea, whereon do you found your belief, that they have such interest? Do you verily believe that at the time of the lading the cargo and at the present time, and also if said goods shall be restored and unladen at the destined port, the goods did, do, and will belong to the same persons and to none others?

8 13th interrogate. How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colorable, or were any bills of lading signed, which were different in any respect from those which were on board the ship, at the time she was taken? What were the contents of such other bills of lading, and what became of them?

14th interrogate. Are there in the United States of America any bills of lading, invoices, letters or instruments relative to the ship and goods, concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the port thereof, and when they were brought or sent to the United States.

15th interrogate. Was there any charter-party signed for the voyage, in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom, was such charter-party made? What were the contents of it?

16th interrogate. What papers, bills of lading, letters or other writings, were on board the ship, at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burnt, torn, thrown overboard, destroyed or cancelled, or attempted to be concealed, and when, and by whom, and who was then present?

17 interrogate. Has the ship, concerning which you are now examined, been, at any time, and when, seized as a prize, and condemned as such? If yea, set forth into what port she was carried, and by whom, and by what authority, or on what account she was condemned?

18th interrogate. Have you sustained any loss by the seizing and taking the ship, concerning which you are now examined? If yea, in what manner do you compute such your loss? Have you already

received any indemnity, satisfaction or promise of satisfaction, for any part of the damage which you have sustained, or may sustain, by this capture and detention, and when, and from whom?

19th interrogate. Is the said ship, or goods, or any, and what part, insured? If yea, for what voyage is such insurance made, and at what premium, and when, and by what persons, and in what country was such insurance made?

20th interrogate. In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom? Or was the lader to take the chance of the market for the sale of his goods?

21st interrogate. Let each witness be interrogated of the growth, produce, and manufacture of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof.

22d interrogate. Whether all the said cargo, or any, and what part thereof, was taken from the shore or quay, or removed or transhipped from one boat, barque, vessel or ship, to another? From what, and to what shore, quay, boat, barque, vessel or ship, and when and where, was the same so done?

23d interrogate. Are there, in any other country, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers or documents, relative to the said ship, or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers or documents, and what are the contents? In whose possession are they, and do they differ from any of the papers on board, and in what particular do they differ?

24th interrogate. Were any papers delivered out of the said ship or vessel, and carried away in any manner whatsoever? And when, and by whom, and to whom, and in whose custody, possession or power, do you believe the same now are?

25th interrogate. Was bulk broken during the voyage in which you were taken, or since the capture, of the said ship? And when, and where, by whom, and by whose orders, and for what purpose, and in what manner?

26th interrogate. Were any passengers on board the aforesaid ship? Were any of them secreted, at the time of the capture? Who were the passengers, by name? Of what nation, rank, profession or occupation? Had they any commission? For what purpose, and from whom? From what place were they taken on board, and when? To what place were they finally destined, and upon what business? Had any, and which of the passengers, any, and what property or concern, or authority, directly or indirectly, regarding the ship and cargo? Were there any officers, soldiers or mariners secreted on board and for what reason were they secreted? Were any of the citizens of the United States on board, or secreted or confined, at the time of the capture? How long, and why?

27th interrogate. Were and are, all the passports, sea briefs,

charter-parties, bills of sale, invoices and papers, which were found on board, entirely true and fair? Or are any of them false or colorable? Do you know of any matter or circumstances to affect their credit? By whom were the passports or sea briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath, or affirmation, of the persons therein described, or were they delivered to, or on behalf of the person or person- who appear to have been sworn, or to have affirmed thereto, without their ever having, in fact, make any such oath or affirmation? How long time were they to last? Was any duty or fee payable, and paid, for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea briefs were granted? And if not, where was the ship at the time? Had any person on board any let-pass, or letters of safe conduct? If yea, from whom and for what business? Had the said ship any
9 license or passport from any foreign power or authority during the voyage? If so, state from whom been obtained, and for what purpose and use?

28th interrogate. Have you written or signed any letters or papers concerning the ship and her cargo, other than those found on board and delivered to her captors? If yea, what was their purport, to whom were they written and sent, and what is become of them?

29th interrogate. Towards what port or place was the ship steering her course, at the time of her being first pursued and taken? Was her course altered, upon the appearance of the vessel by which she was taken? Was her course, at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship's papers? Was the ship, before, or at the time of her capture, sailing beyond or wide of the said place or port to which she was so destined by the said ship's papers? At what distance was she therefrom? Was her course altered, at any, and what time, and to what other port or place, and for what reason?

30th interrogate. By whom, and to whom, hath the said ship been sold or transferred, and how often? At what time, and at what place, and for what sum or consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? Or what security or securities have been given for the payment of the same, and by whom, and where do they live now? Do you know, or believe, in your conscience, such sale or transfer has been truly made and not for the purposes of covering or concealing the real property? Do you verily believe, that if the ship should be restored, she will belong to the persons now asserted to be the owners and to none others?

31st interrogate. What guns were mounted on board the ship, and what arms and ammunition were belonging to her? Why was she so armed? Were there on board any other, and what, arms and ammunition, and when and where — they put on board? and

by whom, or by what authority, or for what purpose or destination, and on whose account were they put on board?

32d interrogate. What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined at the time of the capture?

10 In the United States District Court in and for the Southern District of Florida. In Admiralty.

THE UNITED STATES OF AMERICA
vs.
THE SPANISH STEAMER "LOLA" AND HER CARGO. } Prize.

Deposition of Tomas Betancourt, a witness produced, sworn, and examined *in preparatorio* on the 21st day of May, A. D. 1898, at the United States court-house, Key West, Florida, in said district, on the standing interrogatories established by the district court of the United States for the southern district of Florida, the said witness having been produced for the purpose of such examination in behalf of the captors of a certain ship or vessel called the "Lola" and her cargo.

1. To the first interrogatory deponent answers:

My name is Tomas Betancourt. I was born in the Canary islands, and during the last seven years have lived in Havana, where I have lived for 21 years. I am a married man. My family live in Cuba. I am a subject of Spain.

2. To the second interrogatory deponant answers:

I was present at the time of the taking and seizing of the ship. She has no commission or license.

3. To the 3d interrogatory deponant answers:

11 I was captured near Bahia Honda, Cuba, on the 27th day of April, A. D. 1898. We were captured on account of the war between Spain and the United States. Our boat sailed under the Spanish flag. We had no other colors on board. There was no resistence made at the time of the capture. The U. S. S. "Dolphin" captured us. There were no other vessels present.

4. To the 4th interrogatory deponent answers:

I was appointed commander of the ship by Severo Gonzales, the owner of the boat. I took possession of her in Havana about four years ago. The owner delivered possession. The owner lives in Cuba.

5. To the 5th interrogatory deponent answers:

The vessel is about 55 tons burden. There were six mariners on board, including myself. I only have one now. They are all Spanish subjects. They all came on board from different ports and I hired them.

6. To the 6th interrogatory deponent answers:

The crew had an interest in the cargo, but not in the vessel. One-third was for the ship and two-thirds for the crew. I was

master of the ship at the time of her capture. I have known the vessel for about 15 years. I do not know where she was built.

7. To the 7th interrogatory deponent answers:

The vessel is named "Lola." She has been called by that
12 name for about 9 years. She was once called the Lizzie "Roy" Elveda.

8. To the 8th interrogatory deponent answers:

She had on board a cargo of live fish, which were caught from the waters of ocean. They were caught about eight days before we were captured. We had about 10,000 pound- of fish.

9. To the 9th interrogatory deponent answers:

The vessel at the time of her seizure was owned by Severo Gonzales. He was born in *the* Spain and now lives in Havana, Cuba. He has lived there for a long time. He is a Spanish subject. He has owned the boat about ten years.

10. To the 10 interrogatory deponent answers:

I do not know anything about the bills of sales.

11. To the 11 interrogat*i*ry deponent answers:

The fish were caught from the sea and were put on board as they were caught.

12. To the 12 interrogatory deponent answers:

Two-thirds of the cargo belonged to the crew and the other third belonged to the owner of the vessel.

13. To *hte* 13 interrogat*i*ry deponent answers:

There were no bills of lading signed.

13 14. To the 14 interrogat*i*ry deponent answers:

There are not in the United States any bills of lading or other papers relating to the ship and her cargo.

15. To the 15 interrogatory deponent answers:

There was no charter-party signed for the voyage.

16. To the 16 interrogatory deponent answers:

We only had crew and muster-roll on the said vessel when she was captured; they were the same which we had on board after clearing from our last port of entry.

17. To the 17 interrogatory deponent answers:

The ship has never before been seized and condemned as a prize.

18. To the 18 interrogatory deponent answers:

I have sustained a loss by the capture of this ship and her cargo. I have not received any indemnity or promise of indemnity for any loss which I have sustained or may sustain.

19. To the 19 interrogatory deponent answers:

The ship and cargo are not insured.

20. To the 20 interrogatory deponent answers:

I have already stated that the cargo was the property of
14 the crew and the owner. If it were at the port of its destination it would be theirs and none other.

21. To the 21 interrogatory deponent answers:

The cargo was man*u*factured, produced, and grown in waters of the ocean off the coast of Cuba.

22. To the 22 interrogatory deponent answers:

The cargo was taken from the sea.

23. To the 23 interrogatory deponent answers:
There are no papers of any description concerning said vessel and her cargo except those found on board.
24. To the 24 interrogatory deponent answers:
The prize master took all the papers and documents of the ship.
25. To the 25 interrogatory deponent answers:
The bulk was not broken during the voyage, but since the capture the said cargo was taken by the U. S. marshal.
26. To the 26 interrogatory deponent answers:
There were no person- of any description on board the boat other than the crew.
27. To the 27 interrogatory deponent answers:
All the papers found on board the boat are entirely true and fair.
15 28. To the 28 interrogatory deponent answers:
I have not written or signed any letters or papers concerning the ship and her cargo.
29. To the 29 interrogatory deponent answers:
The ship was steering her course toward Bahia Honda; her course was not altered upon the appearance of the vessel which made the capture. On the day before I was captured, vis., 26th day of April, 1898. I was captured by the U. S. S. "Cincinnatti," and warned not to go in Havana. I changed my course and put for Bahia Honda, where I was told I would be allowed to land. The next morning the U. S. S. "Dolphin" came up and took the ship.
30. To the 30 interrogatory deponent answers:
I do not know how many times the vessel has been transferred or anything about the bills of sale.
31. To the 31 interrogatory deponent answers:
There were no cannons of any description on board the boat, and no arms or ammunition of and kind.
32. To the 32 interrigatory deponent answers:
I have already told all I know concerning this ship and her cargo, and the true property and destination of the same.

TOMAS BETANCOURT.

Sworn to and subscribed before me May 21st, 1898.

J. M. PHIPPS,
Prize Commissioner.

(Endorsed:) Filed May 26th, 1898. E. O. Locke, clerk.

16 In the District Court of the United States, Southern District of Florida.

THE UNITED STATES
vs.
SCHOONER "LOLA" AND CARGO. } Prize.

This cause having come on to be heard upon the liable and proofs and testimony taken *in preparatorio*, and all due proceedings having

been had and proclamation having been duly made in open court, and Thomas Betancourt having appeared and claimed said schooner Lola and cargo upon the grounds of her being a fishing vessel and not liable to capture, and the being fully heard, and it appearing to the court that the said schooner "Lola" and cargo are enemy's property, now, on motion of Joseph N. Stripling, attorney of the United States, it is ordered, adjudged, and decreed that the said schooner "Lola" and cargo be condemned and forfeited to the United States as lawful prize of war, said claim notwithstanding.

And it is further ordered that the marshal proceed to advertise and sell said vessel and cargo, after due and proper notice, at public auction, and make return of the sale and expenses to this court, and deposit the proceeds with the assistant treasurer of the United States at New York, as required by law.

JAMES W. LOCKE, *Judge.*

Key West, Florida, May 30th, 1898.

(Endorsed:) U. S. district court, southern dist. of Fla. United States *vs.* Schr. Lola. Decree of condemnation. Filed May 30, 1898. E. O. Locke, clerk.

17 The United States District Court, Southern District of Florida.

THE UNITED STATES
against
THE "LOLA."

A motion having been made in behalf of the owners of the above-named vessel to open the decree of condemnation and sale and to allow a claim to be filed, and said motion having been argued by counsel for the vessel and for the Government, it is now—

Ordered that the decree of condemnation and sale heretofore made herein be vacated and set aside, and that leave be, and hereby is, granted to the owners of the vessel to file a claim in the name of the master on or before May 30, 1898.

Key West, May 28, 1898.

JAMES W. LOCKE,
U. S. District Judge.

(Endorsed:) U. S. district court, southern district of Florida. United States *vs.* Schr. "Lola." Order setting former decree aside. Filed May 28th, 1898. E. O. Locke, clerk.

18 United States District Court, Southern District of Florida.

THE UNITED STATES OF AMERICA
against
THE "LOLA." } Claim.

And now comes Thomas Betancourt, master and lawful bailee of the fishing boat Lola, and interviewing for the interest of Sebers Gonzales in the said fishing boat, her tackle, apparel, and furni-

ture, and in her fish, as the same are attached as prize at the instance of the United States, he claims the same accordingly; and the said claimant avers that before and at the time of the alleged capture of the said vessel and fish the above-named Sibors Gonzales was the *bona fide* owner of the said vessel, her tackle, apparel, and furniture, and of one-third of said fish, and that the other two-thirds of said fish belonged to this claimant and the other members of the crew, all of whom are Cubans, — prior to the recognition of Cuban independence were Spanish subjects, and that no other person is the owner of said vessel or fish, and that the claimant is the lawful bailee of both the vessel and fish. He further avers that said vessel and fish under the general law and the proclamation of the President of April 26th, 1898, were privileged and exempt from capture and condemnation as a fishing vessel, with her catch, and he denies that the vessel and fish are lawful prize of war.

Wherefore he prays leave to defend accordingly and to show cause why the said vessel and fish at the time of said capture were not liable to seizure and condemnation as prize of war.

THOMAS BETANCOURT.

Sworn to and subscribed before me this 28 day of May, 1898.
J. OTTO, *D'y Clerk.*

CONVERS & KIRLIN,
Proctors for Claimants.

19 United States District Court, Southern District of Florida.

THE UNITED STATES OF AMERICA
against
THE "LOLA." } Test Affidavit.

SOUTHERN DISTRICT OF FLORIDA, *ss:*

Thomas Betancourt, being duly sworn, says:

1. I am master of the fishing boat Lola and lawful bailee of the vessel and her fish. The vessel belongs to Sibors Gonzales, of Havana, a native from Cuba domiciled in Cuba at the time of the recognition of the independence of the Cuban people by Congress, and is used exclusively in the gulf of Mexico for catching small fish. Her keel length is about 51 feet and her tonnage about 35 tons. The fishing is done on shares, one-third of the catch belonging to the owner and two-thirds to the crew. The fish now on board are thus owned. They are kept and sold alive.

2. I left Havana on the last trip April 11th and proceeded to Campeche sound, off Yucatan. We fished there 8 days and then started back to Havana with the catch. We were stopped by the blockading squadron near Havana on May 26th, 1898. Prior to said time we were unaware of the existence of war or any blockade. We were stopped by the United States ship Cincinnati and brought into Key West as prize of war by the "Dolphin." No effort was

made by the vessel to run the blockade after we learned of its existence.

3. I have been master of the said vessel for 4 years. During that time the vessel has carried no cargo save her catches of
20 fish, and has carried no passengers.

Her crew consisted of 6 persons, including the captain. She is of schooner rig, and has two masts.

THOMAS BETANCOURT.

Sworn to and — before me this 28th day of May, 1898.

J. OTTO, *D'y Clerk.*

(Endorsed:) U. S. district court, southern dist. of Fla. U. S. *vs.* The Lola. Claim & test affidavit. Convers & Kirlin, proctors for cl't. Filed May 28th, 1898. E. O. Locke, clerk.

21 In the District Court of the United States, Southern District of Florida.

UNITED STATES
vs.
SCHR. LOLA & CARGO. } Prize.

This cause coming on to be heard and a decree *pro confesso* having been entered (and final decree of condemnation and forfeiture pronounced)—

Now, on motion of Convers and Kirlin, said decree is set aside, and — is permitted to file a claim for said vessel and cargo on account of said vessel being a fishing vessel and therefore not liable to seizure; and said case again coming on to be heard upon such claim, and the court not being satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure, it is ordered and adjudged and decreed that said vessel and cargo of fish be condemned and forfeited and sold.

JAMES W. LOCKE, *Judge.*

Key West, Florida, May 30, 1898.

(Endorsed:) U. S. district court, southern dist. of Fla. United States *vs.* Schr. "Lola." Decree. Filed May 30th, 1898. E. O. Locke, clerk.

22 Whereupon a writ of *venditioni exponas* was issued to the marshal of said district, commanding him forthwith to sell at public auction the said prize vessel "Lola," her tackle, &c., and to deposit the proceeds thereof with the assistant treasurer of the United States at New York, to the credit of said court.

Which writ was afterwards by the marshal returned, showing the proceeds of said vessel to be the sum of eight hundred dollars, which sum was by the marshal deposited as commanded.

23 United States District Court, Southern District of Florida.

The President of the United States to John F. Horr, Esq., marshall of said district, Greeting:

Whereas the fishing smack "Lola" has been libelled in said court and is now in custody of this court by virtue of a writ of attachment issued out of said court; and whereas such proceedings have been had that said vessel and cargo have been ordered by decree of said court to be sold: Now, therefore, you are hereby commanded after due notice to sell at public auction the said fishing smack "Lola" and meke return thereof to this court and deposit the proceeds of sale in the assistant treasury of the United States at New York to be disposed of according to law.

Witness the Honorable James W. Locke, judge of said court, at Jacksonville, this 30th day of May, A. D. 1898.

[SEAL.] E. O. LOCKE, *Clerk.*

(*Marshall's Return.*)

Received this within writ this 30th day of May, 1898, and executed same by selling said vessel "Lola" at public auction for $800.00 and deposited same with the assistant treasurer of the United States, as therein directed.

Aug. 19, 1898.

JOHN F. HORR,
U. S. Marshal.

(Endorsed:) United States *vs.* Smack "Lola." *Vend. ex.* Issued May 30th, 1898. Returned & filed Aug. 19th, 1898. E. O. Locke, clerk.

24 *Statement.*

"Lola."

1899.				
July 11.	Drew a/c watchman		224.00	
	" " prize com		25.00	
	" " interpurter		5.00	
19.	Deposited proceeds credit ass't treasur. N. Y.			800
Sept. 28.	Drew for marshall		78.29	
Oct. 8.	" " clerk		41.75	

25 United States District Court, Southern District of Florida.

THE UNITED STATES, Libellant, Appellees,
against
THE FISHING SMACK "LOLA;" TOMAS BETANCOURT, Claimant, Appellant. } Prize.

And now comes Tomas Betancourt, claimant, —, considering himself ag-rieved by the decision and decree of condemnation herein and alleging error in the said decree, appeals therefrom to the Supreme

Court of the United States. He presents herewith an assignment of errors complained of and a bond for costs, with surety, in the sum approved by the court, and thereupon prays that his said appeal may be allowed, and that the record and all proceedings herein may be duly certified to the Supreme Court of the United States in accordance with the rules and practice in such cases made and provided, to the end that the said appeal may be heard and determined by the said court.

Dated August 15th, 1899.

TOMAS BETANCOURT, *Claimant,*
By CONVERS & KERLIN,
His Proctors.

CONVERS AND KERLIN,
Proctors for Appellant.

Upon reading the foregoing notice and prayer of appeal and the assignment of errors and bond on appeal, it is ordered that the appeal of the claimant, Tomas Betancourt, be, and the same is hereby, allowed.

Dated August 15th, 1899.

JAMES W. LOCKE, *U. S. Judge.*

26 United States District Court, Southern District of Florida.

THE UNITED STATES, Appellee,
against
THE FISHING SMACK "LOLA;" TOMAS BETANCOURT, Claimant, Appellant. } Prize.

Assignment of Error.

The claimant assigns error to the final decision and decree of the United States district court for the southern district of Florida, herein as follows:

First. For that the court omitted and refused to hold that the "Lola" was not subject to condemnation as lawful prize of war.

Second. For that the court omitted and refused to find that the vessels, whilst engaged in fishing, as disclosed by the record, were exempt from capture under the terms of the President's proclamation dated April 26th, 1898, providing that the war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, in accordance with — the fishing vessels in the situation of the "Lola" at the time of her capture are exempt from capture as prize.

Third. For that the court omitted and refused to hold that the vessels and cargoes were the property of Cubans, whose freedom and independence was recognized by the joint resolution of Congress approved April 20th, 1898, and entitled accordingly to
27 exemption from capture as the property of neutrals, or persons entitled to the rights, privileges, and immunities of neutrals.

Fourth. For that the court omitted and refused to allow further proofs of the grounds for the exemption from capture set forth in the claim and test affidavits.

CONVERS & KERLIN,
Proctors for Appellant.

Endorsed: Order allowing appeal and assignment of errors. Filed Aug. 18th, 1899. E. O. Locke, clerk.

28 District Court of the United States, Southern District of Florida.

THE UNITED STATES OF AMERICA
vs.
FISHING SMACK LOLA.

Know all men by these presents that we, Tomas Betancourt, as principal, and the American Surety Company of New York, of 100 Broadway, New York city, New York, and also represented by manager and attorney at Key West, Florida, as surety, are held and firmly bound unto The United States of America, the plaintiffs in the above-entitled action, in the sum of two hundred and fifty dollars, to be paid to the United States of America or their assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fourteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas the above-bounden Tomas Betancourt has appealed to the Supreme Court of the United States from the decree of the United States district court, southern district of Florida, bearing date the 30th day of May, 1898, in a suit in which The United States of America are plaintiffs and the Fishing Smack Lola is defendant:

Now, therefore, the condition of this obligation is such that if the above-bounden appellant, Tomas Betancourt, shall prosecute said appeal with effect and pay all costs which may be awarded
29 against him as said appellant if the appeal is not sustained, then this obligation shall be void; otherwise the same shall remain in full force and effect.

TOMAS BETANCOURT,
By CONVERS & KERLIN, *Proctors.*
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS, *Vice-President.*
SAMUEL S. PERRY, *Attorney.*

[Three documentary stamps, 4, ½, 3.]

STATE AND COUNTY OF NEW YORK, *ss:*

On this 14th day of August, 1899, before me personally appeared David B. Sickels, vice-president of the American Surety Company of New York, to me known, who, being by me duly sworn, did

depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order, and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by law; and the said David B. Sickels further said that he was acquainted with Samuel S. Perry, and knew him to be one of the attorneys of said corporation; that the signature of said Samuel S. Perry subscribed to the said instrument is in the genuine handwriting of the said Samuel S. Perry, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said David B. Sickels, vice-president.

K. J. PIERCEY,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk Co-.

30 At a regular*y* quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be, and they hereby are, and each of them is hereby authorized and empowered to execure and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company, in the performance of contracts other than insurance policies and executing or guaranteeing its business of guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss*:

I, Samuel S. Perry, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolutions.

Given under my hand and the seal of the company, at the city of New York, this 14th day of Aug., 1899.

[SEAL.] SAMUEL S. PERRY, *Attorney.*

American Surety Company of New York.

Incorporated April 14th, 1884.

General offices, 100 Broadway.

Financial Statement June 30th, 1899.

Resources:

Real estate and improvements	$3,013,930.66
Stocks and bonds	1,107,979.10
Bills receiv	114,797.40
Cash in banks and offices	815,776.94
Premiums in course of collection	192,736.02
Accrued interest and rents	38,466.51
	$5,283,686.63

Liabilities:

Bills and accounts payable	$49,129.13
Claims in process of adjustment	209,907.64
31 Premiums reserve requirement	626,233.97
Undivided profits	898,415.89
Surplus	1,000,000.00
Capital stock	2,500,000.00
	$5,283,686.63

STATE OF NEW YORK, *County of New York,* } ss:

David B. Sickels, being duly sworn, says that he is vice-president of the American Surety Company of New York; that said company is a corporation duly created, existing, and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of the said State applicable to said company, and is duly qualified to act as surety under such laws; that said company has also duly complied with and is duly qualified to act as surety under the act of Congress of August 13th, 1894, entitled "An act relative to recognizances, stipulations, bonds, and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of assets and liabilities of said company as rendered pursuant to section 4 of said act of Congress; that said American Surety Company is worth $1,000.00 over and above all its debts and liabilities and such exemptions as may be allowed by law.

DAVID S. SICKELS.

Subscribed and sworn before me this 14th day of Aug., 1899.

[SEAL.] K. J. PEIRCEY,
Notary Public.

Endorsed: Bond on appeal. The within bond approved as to amount and sufficiency of surety. James W. Locke, judge. Filed Aug. 18, 1899. E. O. Locke, clerk.

32 District Court of the United States, Southern District of Florida.

THE UNITED STATES
vs.
THE SMACK "LOLA." } Prize.

Claimants of the cargo herein having appealed from the decree of condemnation herein rendered to the Supreme Court of the United States, it is ordered that the clerk of this court transmit to the said Supreme Court of the United States for inspection, together with the apostles herein, the documents of the ship and cargo in his official keeping, the same to be returned to this court when no longer required.

JAMES W. LOCKE, *Judge.*

August 28th, 1899.

33 UNITED STATES OF AMERICA, *ss:*

To United States, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., on Sept. 21st, 1899, pursuant to an order allowing appeal entered and filed in the clerk's office of the district court of the United States for the southern district of Florida, wherein the Spanish Schooner "Lola," Tomas Betancourt, claimant, is appellant and The United States, libellant, is appellee, to show cause, if any there be, why the judgment against the said Schooner "Lola" mentioned, entered on the thirtieth day of May, 1898, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable James W. Locke, judge of the district court of the United States, this 22nd day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] JAMES W. LOCKE,
Judge U. S. District Court, Southern District of Florida.

Endorsed: Spanish Schooner "Lola," appellant, *vs.* The United States, appellee. Citation. Filed Sept. 1st, 1899. E. O. Locke, clerk.

Marshal's Return.

Received this citation the 25th day of August, 1899, at Jacksonville, Fla., and executed same by service of copy on H. H. Buckman, ass't United States attorney, on Sept. 1st, 1899, at same time exhibiting

original at Jacksonville, the U. S. attorney being absent from city on official business.

JOHN F. HORR, *U. S. Marshal,*
By KATHARINE PILLSBURY,
Office Deputy.

34 In the United States District Court, Southern District of Florida.

THE UNITED STATES OF AMERICA
vs.
SPANISH SMACK "LOLA" AND CARGO. } In Prize.

I, Eugene O. Locke, clerk of the above-mentioned court, hereby certify the foregoing pages, numb-red from one to thirty-three, inclusive, constitute a complete transcript of the record of the proceedings, proofs, and assignment of errors in the above-entitled cause, as appears from record and files of this office.

Seal District Court of the United States, Southern District of Florida.

Witness my hand and the seal of this said court this second day of September, 1899, at Jacksonville, in said district.

EUGENE O. LOCKE, *Clerk,*
By LOUIS STARKE, *Deputy.*

35 UNITED STATES OF AMERICA, *ss:*

To United States, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., on Sept. 21, 1899, pursuant to an order allowing appeal entered and filed in the clerk's office of the district court of the United States for the southern district of Florida, wherein the Spanish Schooner "Lola," Tomas Betancourt, claimant, is appellant and The United States, libellant, is appellee, to show cause, if any there be, why the judgment against the said Schooner "Lola" mentioned, entered on the thirtieth day of May, 1898, should not be corrected and speedy justice should not be done to the parties on that behalf.

Seal District Court of the United States, Southern District of Florida.

Witness the Honorable James W. Locke, judge district court of the United States, this 22nd day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES W. LOCKE,
Judge U. S. District Court, Southern District of Florida.

[Endorsed:] Mar. d'k't, 328. United States district court, southern district of Florida. Spanish Schooner "Lola," appellant, *vs.* The United States, appellee. Citation. Filed Sep. 1, 1899. E. O. Locke, clerk.

Received this citation the 25th day of August, 1899, at Jacksonville, Fla., and executed same by service of a copy on H. H. Buckman, ass't United States attorney, on Sept. 1st, 1899, at same time exhibiting original, at Jacksonville, the U. S. attorney being absent from city on official business.

JOHN F. HORR, *U. S. Marshal*,
By KATHARINE PILLSBURY,
Office Dep'y.

Endorsed on cover: File No., 17,510. S. Florida D. C. U. S. Term No., 396. The Spanish Schooner "Lola," Tomas Betancourt, claimant, appellant, *vs.* The United States. Filed September 9th, 1899.

Nos 395 & 396

Brief of Kirlin for Appellants

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 7, 1899.

395.

THE SPANISH SMACK PAQUETE HABANA,
JUAN PASOS, CLAIMANT, APPELLANT,

vs.

THE UNITED STATES, LIBELANT, APPELLEE.

396.

THE SPANISH SCHOONER LOLA,
TOMAS BETANCOURT, CLAIMANT, APPELLANT,

vs.

THE UNITED STATES, LIBELANT, APPELLEE.

BRIEF FOR THE APPELLANTS.

CONVERS & KIRLIN,
Proctors for Appellants.

J. PARKER KIRLIN,
Advocate.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-6-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK PAQUETE HABANA, JUAN PASOS, *Claimant, Appellant,* *vs.* THE UNITED STATES. } No. 395.

THE SPANISH SCHOONER LOLA, TOMAS BETANCOURT, *Claimant, Appellant,* *vs.* THE UNITED STATES. } No. 396.

BRIEF FOR CLAIMANTS, APPELLANTS.

These are appeals from decrees of the district court of the United States for the southern district of Florida in two fishing-smack cases, which for convenience may be argued together.

Both vessels were condemned as prize of war, and stipulations have been entered into between the claimants and the Government that the *Paquete Habana* shall be decisive of one other case and the *Lola* of nine other cases of vessels similarly situated. The stipulations are printed in the appendix to this brief (pp. 68, 69.)

The Paquete Habana.

This vessel was condemned in a final decree entered May 30 (Rec., pp. 14 and 15). The ground of the condemnation was that " the sloop and her cargo were enemy's property " (p. 15).

There had been a previous decree on default, filed May 26 (Rec., p. 12), in which the grounds of condemnation had been stated as (1) enemy's property, (2) attempting to violate the blockade of Havana. That decree was set aside and vacated by an order entered May 28 (Rec., pp. 12 and 13), which granted leave to the owner of the vessel to file a claim in the name of the master on or by May 30, 1898.

On May 28 a claim was duly filed by Juan Pasos, master and lawful bailee, intervening for the interest of Justa Galban, widow, in the vessel and in the fish that she carried, alleging that at the time of the capture the said Justa Galban, widow, was the *bona fide* owner of the vessel and of one-third of the fish which constituted her cargo, and that the other two-thirds of the fish belonged to the claimant and the other members of the crew, all of whom were Cubans, who, prior to the recognition of Cuban independence, were Spanish subjects. He further alleged that the vessel and cargo, under the general law and the proclamation of the President of April 26, 1898, were privileged and exempt from capture and condemnation as a fishing vessel with her catch, and he denied that the vessel and the fish were lawful prize of war (p. 13).

On the same day Juan Pasos filed a test affidavit, in which he swore that he was master of the *Paquete Habana*, that the vessel belonged to Justa Galban, widow, of Havana, a native-born Cuban, domiciled in Cuba at the time of the recognition of the independence of the Cuban people by Congress, and that the vessel was used exclusively in the coast waters of Cuba for catching small fish.

He further stated that the keel-length of the vessel was about 43 feet; her tonnage about 25 tons; that the fishing was done on shares, one-third of the catch belonging to the owner and two-thirds to the crew; that the fish then on board were so owned, and that they were kept and sold alive; that he left Havana on the last trip on March 25, 1898, and proceeded to Cape San Antonio, on the coast of Cuba, in coast waters, between reefs, and fished there twenty-five days, and then started back to Havana with the catch. The sloop was stopped by the blockading squadron April 25, 1898, prior to which time those on board the vessel were ignorant of the existence of war or of any blockade. She was captured by the *Castine* and brought into Key West as prize of war.

No effort was made to run the blockade after its existence became known.

The crew of the sloop consisted of three persons, including the captain. She was sloop rigged with one mast (Test Aff., Rec., p. 14).

Most of the above facts were also testified to by the master in answer to the standing interrogatories. The master had resided fourteen years in Cuba (Ans. to 1st Int.). The *Paquete Habana* was a coasting vessel, the master having a license to fish, issued by the Spanish government (Ans. to 2d Int.). The vessel was captured near Mariel, being then bound towards Havana. She sailed under the Spanish flag, and had no other colors on board. There was no resistance made at the time of the capture (Ans. to 3d Int.). The master took command of her last at Havana, March 5, 1898, the owner, Justa Galban, delivering possession to him. The vessel was of twenty-five tons burden, and carried three mariners, including himself. One-third of the catch belonged to the owner and the other two-thirds to the crew. The boat was built in Key West (Ans. to 6th Int.). The boat was a fishing smack, and was engaged in running out of Havana for fishing trips (Ans. to 7th Int.). She had a cargo of

fish when captured; the crew caught the fish out of the sea; they had forty kintals of fish on board at the time of the capture (Ans. to 8th Int.). The owner of the vessel is Justa Galban, widow; she lives in Havana, and is a Spaniard by birth (meaning born under Spanish rule; see test affidavit, p. 14). She had been in possession of the vessel for five years. The cargo was taken from Spanish (meaning Cuban) waters (Ans. to 21st Int.). She was sailing towards Havana when she was captured, and was distant from it about 11 miles (Ans. to 29th Int.).

It is apparent from the foregoing evidence that the sloop was a fishing boat of the most innocuous type, and that there was no attempt or design to violate the blockade. In the final decree the sole ground of condemnation was "that the said sloop *Paquete* and her cargo are enemy's property" (p. 15).

The Lola.

The *Lola* was a fishing vessel of 55 tons burden, schooner-rigged, and carried a crew of six, including the master (Ans. to 5th Int.). She was captured near Bahia Honda, on April 27, by the *Dolphin* (Ans. to 3d Int.). She had on board about ten thousand pounds of live fish (Ans. to 8th Int.), which were caught in the waters off the coast of Cuba (Ans. to 21st Int.). As in the preceding case, a one-third interest in the fish belonged to the owner and the remaining two-thirds to the crew (Ans. to 6th Int.). At the time of the capture she was steering her course towards Bahia Honda. The master further says:

"On the day before I was captured, viz., 26th day of April, 1898, I was captured [stopped?] by the U. S. S. *Cincinnati* and warned not to go in Havana; I changed my course and put for Bahia Honda, where, I was told, I would be allowed to land. The next morning the U. S. S. *Dolphin* came up and took the ship" (Ans. to 29th Int., p. 11).

The master probably misunderstood those on the *Cincinnati*, who, doubtless, told him that he could land *beyond* Bahia Honda, that being the easterly end of the blockade (Proclamation of Blockade, April 22, 1898).

The owner of the vessel is Severo Gonzales, a resident of Cuba. This owner delivered the vessel to the present master, who had been in command of her about four years (Ans. to 4th Int.). Gonzales had owned the boat for about ten years, and had lived in Cuba "for a long time" (Ans. to 9th Int.).

The boat was libeled on the 30th of April, and the process against her was returned on the 18th of May. A decree of condemnation by default, not contained in the record, was entered, but by an order dated May 30 leave was granted on that date to the owners of the vessel to file a claim in the name of the master on or before May 30 (Rec., p. 12).

On May 28 a claim was filed by Tomas Betancourt, the master and lawful bailee, alleging that the vessel and one-third of the catch were owned by Gonzales, and that the remaining two-thirds of the fish belonged to the crew, all of whom were Cubans, who prior to the recognition of Cuban independence were Spanish subjects. He further alleged, that under the general law and under the proclamation of the President of April 26, 1898, the vessel and her catch were exempt from capture and condemnation, and he denied that the vessel and the fish were lawful prize of war.

In the test affidavit filed by the master on the same day he reaffirmed his statement that the vessel belonged to Gonzales, a native of Cuba, who was domiciled there at the time of the recognition of the independence of the Cuban people by Congress, and that she was used exclusively in the gulf of Mexico for catching small fish. The keel of the vessel was stated to be 51 feet and her tonnage 35 tons; the fishing, he averred, was done on shares, one-third belonging to the owner and two-thirds to the crew, and the fish on

board at the time of capture were so owned. The fish were kept and sold alive.

It is further shown that the vessel left Havana on her last trip April 11, 1898, and proceeded to Campeche Sound, on the coast of Yucatan, where they had fished for eight days. They were returning to Havana with the fish at the time of the capture, and were stopped by the blockading squadron near Havana on April 26. Prior to said time they were unaware of the existence of war or of any blockade, and no effort was made by the vessel to run the blockade after they learned of its existence (Test Affidavit, pp. 13 and 14). The vessel was of schooner rig, had two masts, and carried six persons, including the captain (p. 14). The ground of condemnation stated in the final decree was "that the said schooner *Lola* and her cargo were enemy's property" (pp. 11 and 12).

The only point of difference between the two cases appears to be that the *Paquete Habana* caught her fish close in shore in Cuban waters, while the fish caught by the *Lola* came from the Mexican side of the Yucatan passage.

Due appeal was taken in both cases, and the leading errors assigned in both are:

First. That the court omitted and refused to hold that the vessels were not subject to condemnation as lawful prize of war.

Second. That the court omitted and refused to find that the vessels, whilst engaged in fishing, as disclosed in the record, were exempt from capture by the terms of the President's proclamation, dated April 26, 1898, providing that the war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, under which fishing vessels in the situation of the *Paquete Habana* and the *Lola* at the time of their capture are exempt from seizure as prize.

Third. That the court omitted and refused to hold that the vessels and cargoes were the property of Cubans, whose freedom and independence were recognized by the joint resolution of Congress approved April 20, 1898, and entitled, accordingly, to exemption from capture as the property of neutrals or persons entitled to the rights, privileges, and immunities of neutrals.

Fourth. That the court omitted and refused to allow further proofs of the grounds of exemption from capture and condemnation set forth in the claim and test affidavits.

POINT FIRST.

INTERNATIONAL LAW DOES NOT SANCTION THE CAPTURE AND CONDEMNATION OF BOATS EXCLUSIVELY ENGAGED IN THE COAST FISHERIES.

By the opening words of the President's proclamation of April 26, 1898, reciting the fact of war with Spain, it was declared to be "*desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice*" (30 Stat., p. 1770).

The adhesion of the Government to the declaration of Paris was announced and further dispositions were made as to the status of enemy property at sea in the line of liberal modern practice.

In short, the United States publicly declared that its policy was in full accord with the principles of modern international law.

The sources from which the law to govern the present cases must be derived are various. But few actual decisions can be referred to, and those are quite remote in time from the present, yet there are, it is believed, fixed practices of long duration bearing on the question, including the previous definite attitude of our own Government, publicly

known, in at least one former war, and an almost, if not quite, uniform consensus of opinion among publicists and international law writers to the effect that such practices have now become definitely crystallized into well-settled law.

Before proceeding to quote fully from the writers whose views, as we conceive, are authoritative on the point, it will not be inappropriate to inquire briefly as to the legitimate weight of such expressions as statements of the real international law. This can be done in no better way than by quoting from the learned judgment of Sir R. Phillimore, himself a distinguished authority on the general subject in the noted case of *The Queen vs. Keyn* (2 Exch. Div., 63, 68–70), where he said:

"In the memorable answer, pronounced by Montesquieu to be *réponse sans réplique*, and framed by Lord Mansfield and Sir George Lee, of the British to the Prussian government, 'The law of nations is said to be founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage.' It is more especially to this usage, as evidencing the consent of nations, that great judges, such among others, as Lord Stowell and Chancellor Kent, and great jurists of all countries, have continually referred. 'It has been contended,' Lord Stowell says, 'that such a sentence is perfectly legal, both on principle and authority. It is said that on principle the security and consummation of the capture is as complete in a neutral port as in the port of the belligerent himself. On the mere principle of security it may perhaps be so, but it is to be remembered that this is a matter not to be governed by abstract principles alone; the use and practice of nations have intervened, and shifted the matter from its foundations of that species; the expression which Grotius uses on these occasions (*placuit gentibus*) is, in my opinion, perfectly correct, intimating that there is a use and practice of nations to which we are now expected to conform' (*The Henrick and Maria*, 4 C. Rob., 54, 55). With respect to 'justice, equity, convenience and the reason of the thing,' one particular class of authority has been much relied upon in the arguments of counsel, namely,

the treatises of learned writers on law, and it is perhaps in this case especially important to assign a proper, and not an extravagant, value to these digests of the principles of public and international jurisprudence. 'All writers upon the law of nations unanimously acknowledge it,' was a fact that weighed greatly with Lord Stowell in the case of the *Maria*, which established the belligerent's right of search.

"Mr. *Wheaton* says: 'Text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent, are placed as the second branch of international law' (*Elem. of Int. Law*, vol. i, p. 59).

"*Lord Mansfield*, deciding a case in which ambassadorial privileges were concerned, said that he remembered a case before Lord Talbot, in which he 'had declared a clear opinion that the law of nations was to be *collected from the practice of different nations and the authority of writers.* Accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, &c., there being no English writer of eminence upon the subject.'

"Chancellor *Kent* says: 'In cases where the principal jurists agree the presumption will be very great in favor of the solidity of their maxims, and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers of international law' (*Kent's Com.*, vol. i, p. 19).

"*Ortolan* (*Dipl. de la Mer*, 1, 1, p. 74) has some very sensible remarks on this subject, which he thus concludes: 'Ces publicistes ont non seulement fourni, pour la gestion des affaires extérieures, une branche de droit international, qui supplée aux lacunes des autres et avertit de leurs vices, mais ils ont même contribué puissamment à la formation et à l'amélioration graduelle du droit international positif.'

"It is also the opinion of a very learned living jurist (*Dr. Franz von Holzendorf, Encycl. der Rechtsw. IV, Das Europäische Völkerrecht, p.* 935) that the usage and practice of international law is in great measure founded upon the tardy recognition of principles which have been long before taught and recommended by the voice of wise and discern-

ing men, and that thus the fabric of international jurisprudence has been built up."

Carrying in mind this exposition and acknowledgment of the just sources of international law, the subjoined extracts from text writers, "founded upon justice, equity, convenience, and the reason of the thing" as well as upon the well-established custom of maritime nations, will serve to show the true status of boats engaged in the coast fisheries.

The doctrine that coast fishing vessels are exempt from capture is by no means modern.

In *Froissart's Chroniques* (vol. 3, p. 41) it is said:

' Pescheurs sur mer, quelque guerre qui soit en France & Angleterre, jamais ne se firent mal l'vn à l'autre; aincois sont amis, & s'aydent l'vn à l'autre au besoin."

Rymer's Foedera (vol. VIII, p. 451) has the following Royal order * under date of October 5, 1406:

"De Securitate pro Piscatoribus.

"Rex, universio et singulio Admirallis &c. Salutem.

"Sciatio quod, quibusdam certio de causis, nos ad præsens moventibus, suscepimus & per Præsentes ponimus & suscepimus, in salvum & securum Conductum nostrum, ac in Protectionem Justicum & Defensionem nostras speciales,

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* "*Rymer's Foedera*, VIII, p. 451.

"Concerning the Safety of Fishermen.

"The King to each and every admiral, greeting:

"Be it known, that for various reasons, we being for the present so inclined, have undertaken and by these presents do establish and decree that under our protection and safe conduct and under our particular charge and care, each and all the fishermen of France, Flanders and Britanny, together with their boats and fishing tackle, may, but only for the purpose of carrying on their fishing, freely and lawfully sail about and travel back and forth and may fish, drift and linger anywhere upon the sea, through and within our domain, limits and territory, and with

universos et singulos Piscatores Franciæ & Flandriæ & Britanniæ, cum Navibus & Batellis suis Piscatoriis, ubicumque supra mare, per & infra Dominia Jurisdictiones & Districtus nostra, pro eorum Piscatione dumtaxat facienda, Velando, Transiundo & Proficiscendo, libere & licite Piscando, Morando, Continuando & cum Piscibus imbri captis, ad partes suas proprias, absque molestia seu impedimento quoqumque, Redeundo, nec non Pisces, Retia ac alia Res & Bona sua quæcumque.

"Et ideo vobis & cuilibet vestrum, mandamus quod Piscatores illos &c. mutatis mutandis ut prædictum est, Redeundo non inferentes eis &c.

"Dum tamen iidem Piscatores & eorum quilibet bene & honeste se gerant, ac quicquam quod in nostri comtemptum & Præjudicium, aut Regni nostri Angliæ, seu Ligeorum nostrorum ejusdem, dampnum & Inquietationem cedere valeat calore Præsentium, non faciant nec attemptent, aut facere vel attemptare præsumant quovis modo.

"Per IPSUM REGEM."

[Dated Oct. 5, 1406, at Westminster.]

The only reported case in which a fishing vessel has been condemned in the English courts is that of the *Young Jacob*, 1 C. Rob., 20. This was the case of a small Dutch vessel taken in April, 1798, on her return from the Dogger Bank to Holland. The real ground of the condemnation seems to have been that the boat was believed to be in the active

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the fish which have been caught in the water, return to their own districts without any interference or obstacle whatever, either to their fish, their nets or any of their belongings.

"Therefore we command you and each of you, not to interfere with the return of such fishermen &c. *mutatis mutandis*, as has been set out above.

"But on the other hand such fishermen and those of them who comport themselves well and properly must not under pain of these presents, do, or undertake, or in any way whatever attempt to do, or undertake, anything which might work to our prejudice or disadvantage or our injury or disturbance, either in our Kingdom of England or in that of our allies.

"By the KING'S OWN HAND."

"Under date of Oct. 5, 1406, at Westminster."

service of the enemy, carrying information acquired in the pretense of fishing. Sir W. Scott said:

"In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment and, as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade. * * * It is a farther satisfaction to me in giving this judgment to observe that the facts also bear strong marks of a false and fraudulent transaction."

This decision, if it can properly be viewed as the case of a vessel entitled to claim the time-honored exemption of purely fishing vessels, was quite contrary to the prevailing practice on the Continent at the same epoch. Whatever is deemed to be the real ground on which the condemnation of the *Young Jacob* was decreed, it was felt to be a disturbing factor in the treatment which it was desirable to extend to fishermen, and consequently, on May 23, 1806, an order in Council was issued which nullified its force as a precedent and restored the fishermen's former status:

"It is this day ordered in Council that all fishing vessels under Prussian and other colors and engaged for the purpose of catching fish and conveying them fresh to market with their crews, cargoes and stores, shall not be molested on their fishing voyages and bringing the same to market; and that no fishing vessels of this description shall hereafter be molested. And the Right Honorable the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty and the Judge of the High Court of Admiralty are to give the necessary directions herein as to them may respectively appertain" (5 C. Rob., 408).

Douglas Owen, in his *Declaration of War* (London, 1889), comments upon that case and the subsequent order as follows:

"Formerly fishermen engaged in their occupation were deemed non-combatants and their property exempt from capture, but Sir W. Scott in the *Young Jacob* (1 Rob., 20), observing that the rule was one of comity and not of law, condemned the vessel as being constantly and exclusively employed in the enemies' trade. But by an Order in Council dated May, 1806, all fishing vessels engaged for the purpose of catching fish and conveying them fresh to market with their crews, cargoes and stores were declared to be free from molestation."

There is no record of the capture of fishing vessels in any of the English reports since the Order in Council of 1806 went into operation.

The latest word on the subject, dealing with the English and American practice, is spoken by Professor *Lawrence* in his valuable *Principles of International Law* (1895), § 206, p. 383:

"As a general rule, private vessels of the enemy may be captured wherever they are found, as long as they are not in neutral waters. There are, however, certain exceptions, some of which rest upon usage so constant and so conformable to the more humane character of modern warfare that we may almost venture to say that they are embodied in the international code, while others have not progressed beyond the stage of comity, and could be ignored by a belligerent State without bringing down upon itself the charge of lawlessness. The exemption of fishing-boats from capture is a somewhat debatable point. Deep-sea fishing vessels are treated like other enemy ships, but a practice of allowing the inshore fishermen of both belligerents to pursue their avocations without molestation has become very general. France holds that it is obligatory. The British doctrine that it is a rule of comity only was laid down by Lord Stowell in the case of the *Young Jacob and Joanna* (1 Rob., 20). The United States, under the influence of Franklin, pledged themselves to exemption

in their treaty with Prussia of 1785, and the stipulation to that effect was renewed in 1799 and again in 1828. The difference between the English and the French view is more apparent than real, for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own State, and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France when Great Britain gave the order to capture them in 1800."

To the same effect: *Walker, International Law* (1893), p. 316.

The *cause célèbre* on the subject in the French courts is that of the Portuguese smack *La Nostra Segnora de la Piedad y Animas*, which was captured in 1801 by the French privateer *Carmagnole* three leagues out to sea opposite Tavira, and was subsequently ordered to be restored. The decision proceeds upon the distinct acknowledgment of the principle that fishing-boats are not considered hostile, and by the settled law of nations are exempt from capture and condemnation. It is reported in full in *Merlin's Repertoire Universel et Raisonné de Jurisprudence* (Brussels, 1827, vol. 25, p. 58), and, with the author's comments on the general subject, is as follows: *

"Les bateaux pêcheurs sont-ils, comme les autres bâtimens de guerre et de commerce, sujets au droit de prise maritime? Ils devraient l'être, si l'on ne consultait que le droit des gens primitif; mais ils en sont affranchis par une sorte de convention tacite entre toutes les nations européennes. Cet affranchissement a néanmoins été contesté par les armateurs du corsaire français *la Carmagnole*, qui avait

* MERLIN, vol. 25, p. 58:

"Are fishing boats, like other vessels of war and commerce, subject to the right of maritime capture?

"They should be if the primitive international law were alone consulted, but they are freed from it by a sort of tacit convention between all the European nations.

"This freedom was nevertheless contested by the owners of the French privateer *La Carmagnole*, which had captured at sea, the 27th Floreal year IX, the Portuguese fishing vessel *Nostra Segnora de la Piedad*

pris en mer, le 27 floréal an 9, le bateau pêcheur portugais *la Nostra Segnora de la Piedad y animas.* Mais écoutons M. Duffaut, dans les conclusions qu'il a données sur cette prise, le 9 thermidor de la même année:

" Le monument le plus ancien que nous ait conservé sur ce point le Code des Prises, est une ordonnance, du 1er octobre 1692, rendue sous le règne de Louis XIV. A cette époque la neutralité parfaite de la pêche était reconnue. L'ordonnance du 1er octobre éloignait, a la vérité, de nos parages, les pêcheurs anglais; mais elle accordait à ceux qui y seraient rencontrés, un sauf-conduit de huit jours pour retourner chez eux; et cette mesure, que les circonstances justifiaient, n'avait pour but que de se garantir de l'espionnage, auquel, sous prétexte de la pêche, se livrait un ennemi qui préparait déjà le bombardement de nos places maritimes, exécuté en 1694.

" Dans la guerre que la France soutint contre l'Angleterre en faveur de l'independance américaine, elle ne s'écarta point de ces principes. *Le desir que j'ai toujours eu* (porte une lettre du roi á l'amiral, en date 5 Juin 1779) *d'adoucir les calamités de la guerre, m'a fait jeter les yeux sur cette classe de mes sujets, qui se consacre au commerce de la pêche, et qui n'a pour subsistance que les ressources que ce commerce lui présente; j'ai pensé que l'example que je donnerais à mes ennemis,*

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y Animas. But let us hear M. Duffaut in the conclusions which he gave on this capture the 9th Thermidor of the same year.

"'The most ancient monument which the *Code des Prises* has kept for us on this point is an ordinance of October 1st, 1692, issued under the reign of Louis XIV. At that epoch the absolute neutrality of the fisheries was recognized. True, the ordinance of October 1st kept away English fishermen from our shores, but it accorded to those who might be found there a safe conduct for eight days to return home, and this measure, which was justified by the circumstances, had for its object merely protection against the spying, which the enemy who was even then preparing the bombardment of our ports which took place in 1694, was carrying on under pretext of fishing.

"'In the war which France maintained against England for American independence, she did not deviate from her principles. *The desire that I have always had* (says a letter of the King to the Admiral, dated June 5th, 1779) *of softening the calamities of war, has made me look after that class of my subjects who devote themselves to the fishing trade, and who have for their subsistence only the resources that this trade presents; I thought that the example which I would give to my enemies, and which can have no other principles bu*

et qui ne peut avoir d'autres principes que les sentimens d'humanité qui m'animent, les déterminerait à accorder à la pêche les mêmes facilités auxquelles je consentirais à me prêter. En conséquence, j'ai donné ordre à tous les commandans de mes bâtimens, aux armateurs et capitaines des corsaires, de ne point inquiéter, jusqu'à nouvel ordre les pêcheurs anglais, et ne point arrêter leurs bâtimens, non plus que ceux qui seraient chargés de poisson frais ; quand même ce poisson n'aurait pas été pêché à bord de ces bâtimens ; pourvu toutefois qu'ils ne soient armés d'aucune arme offensive, et qu'ils ne soient convaincus d'avoir donné quelques signaux qui annonceraient une intelligence suspecte avec les bâtimens de guerre ennemis.

" Bientôt on eut occasion de mettre en pratique les principes contenus dans cette lettre ; et l'arrêt du conseil, du 6 novembre 1780, en offre un exemple remarquable. Cet arrêt, qui renouvela les défenses portées à la date du 5 juin, fut rendu sur une opposition formée par la chambre de commerce de Dunkerque, contre une ordonnance du conseil des Prises, du 10 mai 1780, qui avait déclaré bonne la rançon du bateau pêcheur anglais *le Jean et Sara*. La chambre de commerce exposait dans sa requête, qu'aucune ville du royaume n'etait plus intéressée que celle de Dunkerque au maintien de la liberté de la pêche ; elle rappelait une lettre du ministre de la marine, du 31 mai 1778, qui contenait les intentions du

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the sentiments of humanity which animate me, would induce them to accord to the fisheries the same facilities which I would consent to allow. In consequence I have given orders to all the commanders of my vessels, to the owners and captains of privateers, not to molest English fishermen until further orders, and not to arrest their vessels nor those with cargoes of fresh fish even if the fish had not been caught from these vessels, provided always that they are not armed with any weapon of offense, and that they are not proved to have given any signals which might indicate a suspicious relation with the enemy's vessels of war.

" 'The occasion soon came to put in practice the principles contained in this letter, and the decree of the council of November 6th, 1780, offers a remarkable example thereof. This decree, which renewed the prohibitions stated under date of June 5th, was made by reason of an appeal by the Chamber of Commerce of Dunkirk against a decree of the *Conseil des Prises* of May 10th, 1780, which had declared the ransom of the English fishing boat *John and Sarah* valid. The Chamber of Commerce set forth in its petition that no city of the kingdom was more interested than Dunkirk in the maintenance of the liberty of fishing. It cited a letter of the Minister of Marine of May 31st, 1778, which contained the intentions of the King in this regard, and the French owner himself, as soon

roi à cet égard; et l'armateur français lui-même, dès qu'il fut instruit que la Prise était celle d'un bateau pêcheur, s'empressa de donner un désistement formel de ses prétentions.

" Depuis le commencement de la guerre actuelle, bien loin que le gouvernement français ait rendu sur la liberté de la pêche, des décisions opposées à celles publieés jusqu' alors, on l'a vu au contraire en étendre et en favoriser constamment les principes.

"Au mois de mars 1793, le conseil exécutif autorisa les officiers municipaux de Calais à ouvrir, avec le commandant des Dunes, une negociation tendant à l'affranchissement entier de la pêche, a trois lieues des cotes.

" En thermidor an 3, le comité de salut public renvoya sans échange tous les pêcheurs anglais qui se trouvaient dans les dépôts de la république, ne les considérant pas comme prisonniers de guerre: disposition qui renferme l'expression implicite des égards que mérite partout cette classe d'hommes, dont le travail pénible et peu lucratif, ordinairement exercé par des mains faibles ou agées, est si étranger aux operations de la guerre.

" Mais pourquoi chercher des règles de conduite dans des actes qui sont loin de nous? N'avons nous pas sous les yeux l'exemple récemment donné par le gouvernement

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as he learned that the prize was a fishing vessel, hastened to give a formal release of his claims.

" 'Since the beginning of the present war, far from having given decisions opposed to those published up to that time upon the liberty of fishing, the French government has been seen on the contrary to extend and constantly favor its principles.

" 'In the month of March, 1793, the Executive Counsel authorized the municipal officers of Calais to open negotiations with the commander of the Dunes tending to the entire freedom of fishing for three leagues from the coast.

" 'In Thermidor of year 3, the Committee of Public Safety, sent back, without exchange, all the English fishermen who were in the depots of the Republic, not considering them as prisoners of war, a disposition which contains the implied expression of the consideration deserved by this class of men, whose hard and poorly-paid work, ordinarily done by feeble and aged hands, is so foreign to the operations of war.

" 'But why seek rules of conduct in acts which are so far from us? Have we not under our eyes the example recently given by the French government when the British ministry brusquely and under vain pre-

français, lorsque le ministère britannique rompit brusquement, et sous de vains prétextes, la convention relative à la neutralité réciproque des pêcheurs, et sacrifia quelques malheureuses familles aux alarmes que lui causait la conféderation maritime du Nord? Ne l'a-t-on pas vu protester contre cette détermination violente, et manifester, par le rappel de son commissaire à Londres, l'indignation qu'elle lui causait? Ne l'a-t-on pas vu dénoncer un tel acte comme *contraire à tous les usages des nations civilisées, et au droit commun qui les régit, meme en temps de guerre, et comme donnant à la guerre actuelle un caractère d'acharnement et de fureur qui detruisait jusqu'aux rapports d'usages dans une guerre loyale? Enfin, ne l'a-t-on pas vu déclarer en même temps, qu'ayant toujours eu pour premier désir de contribuer a la pacification générale, et pour maxime d'adoucir, autant que possible, les maux de la guerre, il ne pouvait songer, pour sa part, a rendre de miserables pêcheurs victims de la prolongation des hostilités; qu'ils s'abstiendrait de toutes les représailles, et qu'il ordonnait au contraire que les bâtimens français armés en guerre ou en course, continuassent à laisser la pêche libre et sans attente?*

"Il est donc constant que les bateaux pêcheurs doivent jouir d'une franchise entiere; le gouvernement français l'a toujours ouvertement favorisée, et le cabinet de Saint-James

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texts, broke the convention relative to the reciprocal neutrality of fishermen, and sacrificed some unfortunate families to the alarm which the maritime confederation of the north caused it? Have we not seen it protest against this violent proceeding, and manifest by the recall of its commissioner at London, the indignation which this caused? Have we not seen it denounce such an act as *contrary to all the usages of civilized nations, and to the common law which controls them, even in time of war, and as giving to the present war a character of rage and fury which destroyed even the usual intercourse of a loyal war?* Finally have we not seen it declare at the same time, that *having always had for its first desire to contribute to the general pacification and for a maxim to soften as much as possible the hardships of war it could not dream for its part to render miserable fishermen the victims of the prolongation of hostilities, that it would abstain from all reprisals and that it decreed on the contrary, that French men-of-war or privateers should continue to leave the fisheries free and without attack?*

"'It thus appears that fishing boats should enjoy perfect freedom. The French government has always favored this, and the cabinet of St. James has not always disregarded it. In the course of the present war, a convention concluded between the Spaniards and the English, and signed

ne l'a pas toujours meconnue. Dans le cours de la présente guerre, une convention conclue entre les Espagnols et les Anglais, et signée des amiraux *Massaredo* et *Saint-Vincent*, statua qu'aucune hostilité n'aurait lieu contre les bateaux pêcheurs des deux nations et leur équipages, soit dans le canal de Gibraltar, soit dans la mer septentrionale.

" La règle générale ne parait susceptible d'aucune doute; elle derive du droit des gens, qui est naturellement fondé, dit Montesquieu, sur ce principe, *que les diverses nations doivent faire dans la paix le plus grand bien, et dans la guerre le moins de mal qu'il est possible, sans nuire à leurs véritables intêrêts.*

" Il ne s'agit plus maintenant que de savoir si quelque exception défavorable ne s'élève point contre le bateau portugais qui fait l'objet de cette discussion.

" Et d'abord, quoiqu'on ne puissent argumenter en sa faveur d'aucune convention particulière arrêteé avec le Portugal, je ne crois pas qu'on doive pour cela priver *la Nostra Segnora de la Piedad* d'un avantage que le gouvernément de la république, ainsi qu'on l'a vu plus haut, avait laissé généreusement aux pêcheurs anglais, moins comme un droit acquis et convenu (puisqu'il n'y a point de droit sans réciprocité, et que, dans l'hypothèse, la réciprocité, n'existait pas), que comme une chose inhérente à la qualité

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by Admirals Massaredo and St. Vincent, established that no hostile act should be directed against the fishing boats of the two nations and their crews, whether in the Strait of Gibraltar or in the Northern Sea.

" 'The general rule appears susceptible of no doubt. It flows from the law of nations which is naturally founded, says Montesquieu, on this principle, *that the different nations should do the greatest good in time of peace, and the least possible harm in time of war without doing injury to their true interests.*

" 'There only remains now to learn if some unfavorable exception arises against the Portuguese vessel which is the subject of this discussion.

" 'First, although no special convention with Portugal can be cited in its favor, I do not think that on that account the *Nostra Segnora de la Piedad* should be deprived of an advantage which the government of the Republic, as has been seen above, had generously left to the English fisherman, less as an acquired and stipulated right (since there is no right without reciprocity, and reciprocity did not exist) than as something inherent to the essentially pacific quality of the individuals, and accorded by the desire to contribute to the progress of civilization. Again, it is not accord-

essentiellement pacifique des individus, et accordé par le désir de contribuer aux progrès de la civilisation. D'ailleurs, ce n'est point user d'une faveur étrange, que d'en agir avec les Portugais comme avec les Anglais dont ils sont les alliés.

" En second lieu, *la Nostra Segnora de la Piedad*, sortie uniquement pour la pêche, uniquement occupée de ce travail tous le temps qu'elle tint la mer, ne parait pas s'être éloignée des eaux du Portugal : elle était partie de Penichi ; elle fut prise à trois lieues en mer, ayant le cap sur Tavira. Les declarations du capitaine *los Santos* s'accordent parfaitement avec le procès-verbal de capture ; et toute la déposition de ce capitaine porte un caractère de simplicité et de bonne-foi qui inspire d'autant plus de confiance, qu'il n'a fait aucune reclamation ; et que, dans l'ignorance complète des principes qui le protégeaient, il n'a point cherché à éluder la peine qu'il croyait intimement attachée à sa qualité de sujet d'une puissance ennemie.

" D'un autre coté, ce mistic n'avait point d'armes, et son équipage ne présentait pas un nombre d'hommes supérieur à celui qu'exigeaient la manœuvre, un travail de plusieurs jours, et le service des filets.

" On ne peut également concevoir aucun soupçon de l'état de salaison ou se trouvait le produit de la pêche. Cette pre-

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ing a signal favor to act towards the Portuguese in the same way as toward the English, of whom they are the allies.

" 'In the second place, the *Nostra Segnora de la Piedad* going out solely for fishing, and occupied solely in this work all the time she was at sea does not appear to have removed from Portuguese waters. She had sailed from Penichi ; she was taken three leagues out at sea, opposite Tavira. The declarations of Captain Los Santos accord perfectly with the official report of the capture, and the whole deposition of this captain has a character of simplicity and good faith which inspires the more confidence as he makes no claim and as in complete ignorance of the principles which protected him, he has not sought to escape the penalty which he thought strictly attached to his quality of subject of a hostile power.

" 'Again, this lugger had no arms, and its crew did not consist of more men than were necessary for navigating, for the handling of the nets, and for several days' work.

" ' Nor can any suspicion arise by reason of the pic kling of the products of the fishing. This precaution was necessary to protect the fish from the effects of the heat ; nor can this fish, caught by the hands of labor, be likened to the ordinary material of cargoes, nor considered as the product of trade. Perhaps it might have been destined to become such,

caution était necessaire pour mettre le poisson à l'abri des effets de la chaleur: recueilli par des mains laborieuses, ce poisson ne peut également être assimilé à la matiere ordinaire des cargaisons, ni consideré comme provenant du commerce. Peut être était-il destiné à y entrer; mais on n'aura point perdu de vue que la lettre du 5 juin 1779, que j 'ai citeé, fut écrite en faveur de cette classe qui se consacre au commerce de la pêche, et qui n'a pour subsistance que les ressources que ce commerce lui presente; expressions qui indique clairement que le législateur n'a pas voulu se borner envers les pêcheurs à de stériles demonstrations d'humanité.

" D'apres ces considérations, je conclus a la restitution du bateau pêcheur *la Nostra Segnora de la Piedad y animas.*"

" Le même jour, décision, au rapport de M. Moreau, par laquelle 'le conseil, faisant droit sur les conclusions du commissaire du gouvernement, et adoptant les principes d'humanité et les maximes du droit des gens qui y sont developpés, ordonne que le bateau pêcheur *la Nostra Segnora de la Piedad y animas*, amené à Cartaya par le corsaire français *la Carmagnole*, ensemble le poisson qu'il renfermait, ou le produit net de la vente qui aurait pu en être faite, seront restitués au maitre et patron du bateau pêcheur, ou à son fondé de pouvoirs pour en disposer ainsi qu'il avisera; à quoi faire, tous gardiens, séquestres et dépositaires seront contraints même par corps, quoi faisant, dechargés.' "

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but it must not be forgotten that the letter of June 5th, 1779, which I have cited, was written in favor of *that class engaged in the fisheries, and which has for its subsistence only the resources which that trade affords*, expressions which clearly indicate that the legislator did not wish to limit himself with regard to fishermen to fruitless demonstrations of humanity.

" 'From these considerations I come to the conclusion that the fishing boat *La Nostra Segnora de la Piedad y Animas* should be restored.'

"The same day decision on the report of M. Moreau by which 'the council agreeing with the conclusions of the government commissioner and adopting the principles of humanity and the maxims of the law of nations which are there spread out, orders that the fishing boat *La Nostra Segnora de la Piedad y Animas*, brought into Cartaya by the French privateer *La Carmagnole*, together with the fish on board, or the net product of the sale which may have been made thereof, shall be restored to the master of the fishing boat, or to his duly appointed attorney to dispose of as he may see fit, to do which all guardians, keepers and depositaries shall be compelled, by force if necessary, and the same having been done, are discharged.' "

The more modern writers make no mention of other decisions of courts touching the point, but confine their statements to an account of the recent practices of nations on the general subject and the announcement of what is considered the present settled law.

Reference will now be made to some of the German and French authors writing since 1850 and down to the present time, and to the practice in the last war before our own—that between Japan and China:

Heffter, Das Europäische Völkerrecht* (6th ed., 1873), section 137, says:

"Dehnt sich der Krieg auch auf die See aus, so sind nicht allein die Schiffe der feindlichen Staatsgewalten gegenseitig dem Rechte der Eroberung und Aneignung unterworfen, sondern man legt sich auch eine unbedingte Appropriationsbefugniss gegen feindliche Privatschiffe und Güter bei wovon man nur etwa die Fahrzeuge und Geräthschaften der Fischer an den Küsten menchenfreundlich ausnimmt desgleichen schiffbrüchige und verschlagene Güter."

And in a note to this section:

"In Frankreich haben sich die Gerichte dem Herkommen gemäss (*Ortolan* II, 49) sehr bestimmt dahin ausgesprochen, dass nicht einmal zur Ausübung von Repressalien Fischerboote des Feindes als gute Prise behandelt werden dürften," citing *Sirey*, Rec. gén. I, 2, 331; *Merlin, Repert Univ.* M. "*Prise Maritime.*"

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* Heffter. European International Law.

"Sec. 137. If the war also extends to the sea, not only are the vessels of the hostile executive powers mutually subject to the right of conquest and confiscation, but there is also added an absolute right of appropriation in regard to the private ships and goods of the enemy, from which there are only excepted by way of humanity, the vessels and implements of coast fishermen, together with cases of shipwreck and shipwrecked goods.

"In France tribunals have very positively expressed themselves in conformity to this question, and hold that not even by way of reprisal could fishing boats of the enemy be treated as good prize."

Kaltenborn, Europäische Seerecht* (1851), vol. II, p. 480, ch. IX, "Rechte des Seehandels im Seekriege," says:

"Ausgenommen von der Beschlagnahme und Confiscation feindlicher Güter pflegen in der Praxis der vornehmsten Staten zu sein—

"(1) Die Fahrzeuge und Geräthschaften der Fischer an den Küsten" (citing Heffter's note *supra* verbatim).

Perels,† *Das Internationale öffentliche Seerecht* (1882), p. 216, says:

Die Exemtion des Seefischereigewerbs von dem Seebeuterecht darf auch für das heutige positive Völkerrecht als durch wohlbegründete Gewohnheit feststehend erachtet werden.

Bluntschli, Das Moderne Völkerrecht‡ (1872), sec. 667, says:

Die Fischerboote der Angehörigen des feindlichen States dürfen nicht als Prise Weggenomen werden.

"In dieser Ausnahme, welche die Kriegsitte macht, und insbesondere von den französischen Gerichtshöfen in weitestem Umfang geschützt wurde (vgl. Heffter, sec. 137), bricht das natürliche Recht durch, welches zur allgemeinen Regel zu werden geeignet ist. Wenn die Fischerboote zu kriegerischen Zwecken dienen, dann sind sie der Wegnahme ausgesetzt, aber nicht, so lange sie von dem friedlichen Berufe der Fischer benutzt werden."

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* KALTENBORN, EUROPEAN LAW OF THE SEA (1851), vol. II, p. 480, ch. IX, "Law of Maritime Commerce in Maritime War," says:

"In the practice of the leading States it is customary to except from the seizure and confiscation of enemy goods—

"(1) The vessels and implements of coast fishermen" (citing Heffter's note *supra* verbatim).

† PERELS, INTERNATIONAL PUBLIC LAW OF THE SEA (1882), p. 216:

"The exemption of the fishing trade from the law of prize in modern positive international law may be considered as well established through well-founded custom."

‡ BLUNTSCHLI, MODERN INTERNATIONAL LAW (1872), sec. 667:

The fishing boats of subjects of hostile countries are not allowed to be captured as prize.

"The natural law which should properly become a universal rule breaks through in this exception which is made by the custom of war, and which has been protected especially by the French courts of justice to the widest extent (see *Heffter*, sec. 137). If the fishing boats serve war-like purposes, then they are exposed to capture, but not so long as they are used in the peaceful calling of fishermen."

The later French authors lay down the rule of exemption for fishing vessels in equally emphatic terms.

De Cussy, Phases et Causes Célèbres du Droit Maritime des Nations* (1856), Book I, title III, § 36, vol. I, p. 291, says:

"En temps de guerre, la liberté de la pêche est respectée par les belligérants: les bateaux pêcheurs sont considerés comme neutres; ils ne sont soumis, en droit comme en principe, ni à la capture, ni à la confiscation.

"Dans le livre II chap. XX nous ferons connaître plusieurs faits et plusieurs décisions qui prouvent que *la liberté* et *la neutralité parfaites* des bâteaux pêcheurs ne sont point illusoires."

De Cussy (vol. 2, p. 164), Book II, devotes an entire chapter (XX) to the subject, "De la Liberté et de la Neutralité Parfaite de la Pêche," from which we extract the following:†

"Si l'on ne consultait que le droit des gens positif, les bateaux-pêcheurs seraient soumis, comme tout autre bâti-

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* DE CUSSY, vol. I, p. 291: "In time of war, the freedom of the fisheries is respected by the belligerents: fishing boats are considered as neutral: by law, as in principle, they are subjected neither to capture nor to confiscation.

"In Book II, chap. XX, we shall make known several instances and decisions which prove that *the freedom* and *the complete neutrality* of fishing boats are not illusory."

† DE CUSSY, vol. II, p. 164: OF THE FREEDOM AND COMPLETE NEUTRALITY OF THE FISHERIES.

"If positive international law alone were consulted, fishing boats would be subjected, like all other merchant vessels, to the law of prize; a sort of tacit agreement between all the European nations frees them from it, and several official declarations have confirmed this privilege in favor 'of a class of men whose hard and poorly paid work, ordinarily performed by feeble and aged hands, is so foreign to the operations of war.'

"This is the doctrine professed by the committee of public safety of the French Republic when it sent back without exchange the English fishermen who were in France in the month of Thermidor, year III (July, 1796), not considering them as prisoners of war.

"Already, toward the middle of the 17th century, the complete neutrality of the fisheries was admitted as a principle of maritime international law, and Louis XIV, while keeping away from the coast of France the English fishermen whom he suspected of acting as spies by his ordinance of October 1, 1692, granted to the fishermen who should be met an eight-day safe conduct to return home."

ment de commerce, au droit de prise; une sorte de convention tacite entre toutes les nations européennes les en affranchit, et plusieurs déclarations officielles ont confirmé ce privilège en faveur 'd'une classe d'hommes dont le travail pénible et peu lucratif, ordinairement exercé par des mains faible et agées, est si etranger aux opérations de la guerre.'

" C'est cette doctrine que professa le comité de salut public de la république francaise lorsqu'il renvoya, sans échange, les pêcheurs anglais qui se trouvaient en France, au mois de thermidor an III (juillet 1796), ne les considérant pas comme prisonniers de guerre.

" Déjà, vers le milieu du 17e siècle, la neutralité parfaite de la pêche était admise au nombre des principes du droit maritime des nations; aussi Louis XIV, tout en éloignant des côtes de France les pêcheurs anglais qu'il soupçonnait de se livrer à l'espionage, accorda-t-il, par son ordonnance du 1er octobre 1692, aux pêcheurs qui seraient rencontrés, un sauf-conduit de huit jours pour retourner chez eux."

*Pistoye et Duverdy, Des Prises Maritimes** (about 1860), vol. 1, p. 314, say:

" Les navires ennemis, avons nous dit, sont de bonne prise; pas tous, cependant: car il resulte de l'accord unanime des puissances maritimes qu'une exception doit être faite en faveur de pêcheurs côtiers. Ces pêcheurs sont respectés par l'ennemi, tant qu'ils se livrant uniquement à la pêche."

Ortolan, Diplomatie de la Mer, (1864,) II, p. 51, says:†

" Toutefois, la coutume admet une exception en faveur des bateaux qui se livrent à la pêche côtière; ces bateaux ainsi que leurs équipages sont à l'abri de la capture et exempts de toute hostilité.

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* Pistoye and Duverdy—Maritime Prizes, vol. 2, p. 314:

" Enemy vessels, as has been said, are good prize. Not all, however; for it is established by the unanimous accord of the maritime powers that an exception must be made in favor of coast fishermen. Such fishermen are respected by the enemy so long as they devote themselves exclusively to fishing."

†Ortolan, Diplomacy of the Sea, II, p. 51:

" Nevertheless, the custom admits an exception in favor of the boats engaged in coast fisheries: These boats, as well as their crews are free from capture and exempt from all hostilities.

" The coast-fishing industry is, in effect, entirely pacific and of much less importance than maritime commerce or the great fisheries in regard to

"L'industrie de la pêche côtière est, en effet entièrement pacifique et d'une importance, quant à la richesse nationale qu'elle peut produire, bien moins grande que celle du commerce maritime ou des grandes pêches. Paisibles et tout à fait inoffensifs, ceux qui l'exercent, parmi lesquels on voit souvent des femmes, peuvent être appelés les moissonneurs des mers territoriales, puis qu'ils se bornent à en récolter les produits; ce sont, pour la plupart, des familles pauvres qui ne cherchent guère dans ce métier que le moyen de gagner leur vie.

"Depuis des temps reculés la France a donné l'exemple de la mise en pratiques de l'adoucissement fait en leur faveur aux maux de la guerre. * * *

"Dès le commencement de la guerre de l'indépendance americaine, Louis XVI. voulant donner l'exemple à ses ennemis, ordonna de ne point inquiéter les pêcheurs anglais, et de ne point arrêter leurs bâtiments, non plus que ceux qui seraient chargés de poisson frais, quand même ce poisson n'aurait pas été pêché à bord de ces bâtiments, 'pourvu toutefois,' disait S. M. dans une lettre à l'admiral qu'ils ne soient armés d'aucunes armes défensives, et qu'ils ne soient pas convaincus d'avoir donné quelques signaux qui annonceraient une intelligence suspecte avec les bâtiments de guerre ennemis.

"Il parait que les Anglais usèrent de réciprocité pendant tout le cours de cette guerre. Mais dans celle de la révolu-

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the national wealth which it can produce. Those engaged in it, peaceful and entirely inoffensive, and among whom women are often seen, may be called the harvesters of territorial waters, as they confine themselves to gathering in the products thereof; they are for the greatest part, poor families who seek in this trade only the means of gaining a livelihood.

"Since early times France has given the example of putting in practice the softening of the evils of war made in their favor. * * *

"From the beginning of the war of American independence Louis XVI wishing to give the example to his enemies gave orders not to molest the English fishermen and not to arrest their boats, nor those with cargoes of fresh fish, even if such fish had not been caught from these boats 'provided always' said His Majesty in a letter to the admiral 'that they are not armed with any weapon of defense and that they are not proved to have given any signals which might indicate suspicious relations with the enemies' vessels of war.'

"'It appears that the English reciprocated throughout the whole course of this war. But in that of the French revolution they often departed

tion française, ils s'écarterènt souvent de cette pratique si conforme aux sentiments d'humanité; et ce ne fut pas par des actes isolés dont la responsabilité serait tombée seulement sur les capitaines anglais qui en étaient les auteurs, mais bien d'après les ordres exprès du gouvernement britannique, notamment d'après l'ordre du 24 janvier 1798, qui enjoignait aux commandants des vaisseaux anglais de faire saisir les pêcheurs française et hollandais, et leurs bateaux.

" Néanmoins, le gouvernement française, ne voulant pas user de représailles, renouvela au mois de mars 1800 les ordres donnés en 1779 par Louis XVI. Ces ordres ayant été communiqués au *Transport Office* de Londres, par M. Otto qui résidait en cette ville en qualité de commissaire pour l'échange des prisonnieres de guerre, le gouvernement anglais révoqua, le 30 mai, ses ordres du 24 janvier 1798. Mais peu après, sous divers prétextes qui donnèrent lieu à des plaintes de sa part, il remit en vigueur ces mêmes ordres.

" Le premier consul enjoignit alors à M. Otto de déclarer que 'si, d'une part, cet acte du gouvernement britannique, contraire à tous les usages des nations civilisées et au droit commun qui les régit, même en temps de guerre, donnait à la guerre actuelle un caractère d'acharnement et de fureur qui détruisait jusqu'aux rapports d'usage dans une guerre loyale; de l'autre, il était impossible de ne pas reconnaitre que cette conduite du gouvernement anglais ne tendait qu'à exaspérer davantage les deux nations, et à éloigner encore le terme de la paix; qu' en conséquence, lui, M. Otto, ne

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from this practice, so conformable to sentiments of humanity; and it was not by isolated acts, the responsibility for which would have fallen alone on the English captains who were the authors thereof, but by express orders of the British government, notably by the order of January 24, 1798, which instructed the commanders of English vessels to seize French and Dutch fishermen and their boats.

" Nevertheless, the French government, not wishing to make reprisals, renewed in the month of March, 1800, the orders given by Louis XVI in 1779. These orders having been communicated to the Transport office of London by M. Otto, who resided in that city as commissioner for the exchange of prisoners of war, the English government revoked on May 30 its orders of January 24, 1798. But soon after, under various pretexts which occasioned complaints on its part, it put these same orders into effect again.

" The first consul then instructed M. Otto to declare that 'though this

pouvait plus rester dans un pays où non-seulement on avait abjuré toute disposition à la paix, mais où les lois et les usages de la guerre étaient méconnus et violés.'

"M. Otto déclara en même temps que le gouvernement français s'abstiendrait de toutes représailles afin de ne pas rendre, pour sa part, de misérables pêcheurs victimes de la prolongation des hostilités."

Ortolan, II, pp. 448, 449,* quotes the orders given to the French navy March 31, 1854, on the outbreak of the Crimean war:

"Instructions addressées par Son Excellence le ministre secrétaire d'État au département de la marine et des colonies à MM. les officiers généraux, supérieurs et autres, commandant les escadres et les bâtiments de Sa Majesté Impériale. * * *

"§ 2. Vous n'apporterez aucun obstacle à la pêche côtière, même sur les côtes de l'ennemi; mais vous veillerez à ce que cette faveur, dictée par un intérêt d'humanité, n'entraine aucun abus préjudiciable aux opérations militaires et

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act of the British government, contrary to all the usages of civilized nations and to the common law which controls them, even in time of war, gave to the present war a character of rage and fury which destroyed even the usual intercourse of a loyal war; yet it was impossible not to recognize that this conduct of the English government tended only further to exasperate the two nations and to postpone the time of peace; that consequently, he, M. Otto, could no longer remain in a country where not only all desire of peace was abjured but also the laws and usages of war were disregarded and violated.'

"M. Otto stated at the same time that the French government would abstain from all reprisals so as not to make, for its part, miserable fishermen the victims of the prolongation of hostilities."

* "Instructions given (in 1854) by His Excellency the Minister Secretary of State for the Department of the Navy and the Colonies to the general officers, superior and other, commanding the squadrons and vessels of His Imperial Majesty.

"§ 2. You will not interfere in any way with the coast fisheries even on the enemy's shores; but you will see that this favor, dictated by interests of humanity, does not give rise to any abuse which may prejudice military and maritime operations. If you are in service in the waters of

maritimes. Si vous êtes employés dans les eaux de la mer Blanche, vous laisserez aussi subsister sans interruption, et sauf répression en cas d'abus, l'échange de poisson frais, de vivres, d'ustensiles et d'agrès de pêche qui se fait habituellement entre les paysans des côtes russes de la province d'Archangel et les pêcheurs des côtes du Finnmarken norvégien."

Snow, Cases on International Law, pp. 565, 566, quotes the orders given to the French navy in the Franco-Prussian war: *

"Instructions addressées par S. Exc. l'amiral ministre secretaire d'État, àu département de la marine et des colonies. A MM. les officiers généraux, supérieurs et autres commandant les escadres et les bâtiments de sa majesté impériale.

"Paris, le 25 juillet, 1870.

"§ 2. PÊCHERIES.—Vous n'apporterez aucun obstacle à la pêche côtière, même sur les côtes de l'ennemi; mais vous veillerez à ce que cette faveur, dictée par une intèrêt d'humanité, n'entraîne aucun abus préjudiciable aux opérations militaires ou maritimes."

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the White sea you will also allow to go on without interruption and subject to repression in case of abuse, the exchange of fresh fish, of provisions, of utensils, and of tackle, which is habitually made between the peasants of the Russian shores of the province of Archangel and the fishermen of the shores of Norwegian Finnmark.

* "Instructions given by His Excellency the Minister Secretary of State for the Department of the Navy and the Colonies to the general officers, superior and other, commanding the squadrons and vessels of His Imperial Majesty.

"Paris, July 25, 1870.

"§ 2. FISHERIES.—You will not interfere in any way with the coast fisheries, even on the enemy's shores; but you will see that this favor, dictated by interests of humanity, does not give rise to any abuse which may prejudice military or maritime operations."

Calvo, 4 *Droit International* (5th ed. 1896), pp. 325–327,* fully states the rule, with its limitations, as he considers it established and acknowledged today:

"§ 2367. Malgré les rigueurs que les guerres maritimes font péser sur la propriété privée, malgré l'étendue des droits reconnus aux belligérants, on exempte généralement de saisie ou de confiscation les bâteaux pêcheurs, les navires affectés a des missions scientifiques, et ceux qui, par suite de naufrage ou dans l'ignorance de l'état de guerre, relâchent, sur les côtes ou dans les ports ennemis.

"§ 2368. La France, dans la plupart de ses guerres sur mer, a exempté de capture les barques et les bâteaux employés exclusivement à la pêche. Cette exception est parfaitement justiciable: 'L'industrie de la pêche côtière, dit Ortolan, est entièrement pacifique et d'une importance, quant à la richesse nationale qu'elle peut produire, bien moins grande que celle du commerce maritime ou des grandes pêches. Paisibles et tout à fait inoffensifs, ceux qui l'exercent, parmi lesquels on voit souvent des femmes, peuvent être appelés moissonneurs des mers territoriales, puisqu'ils se bornent à en récolter les produits; ce sont, pour la plupart des familles pauvres, qui ne cherchent guère dans

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*4. Calvo International Law, sec. 2367.

"Notwithstanding the hardships that maritime wars impose on private property, notwithstanding the extent of the recognized rights of belligerents, fishing boats and vessels engaged in scientific missions and those which by reason of shipwreck or ignorance of a state of war, touch the shores or put into the ports of an enemy are generally exempted from seizure or confiscation.

"§ 2368. France in the greater part of its maritime wars has exempted from capture the vessels and boats exclusively employed in fishing. This exception is perfectly proper. 'The coast fishing industry (says Ortolan) is entirely pacific and of an importance very much less than that of maritime commerce or of the great fisheries in relation to the national wealth that it can produce. Peaceable and entirely inoffensive, those who engage in it, among whom women are often seen, can be called the harvesters of territorial waters as they confine themseves to gathering its products. They are, for the greater part, poor families who only seek in this trade the means of earning a livelihood.' (Ortolan, 4th edition, II, Book 3, chapter 2, p. 51.)

"Sec. 2369. The royal edicts of 1543 and 1584 and article 80 of the

ce métier que le moyen de gagner leur vie' (Ortolan, 4e édit, II, liv. III, ch. 11, p. 51).

"§ 2369. Les édits royaux de 1543 et de 1584, et l'article 80 de la Juridiction de la marine imposaient à cet égard une abstention absolue aux commandants de croiseurs et de corsaires. Si l'ordonnance de 1681 ne rappela pas cette défense et si l'ordonnance de 1692 fit disparaître l'exception au profit des bâteaux de pêche en les déclarant confiscables, cela tient, comme on sait, à la conduite violente des officers de la marine britannique, qui, au mépris des stipulations des traités, saisissaient et détruisaient les barques des pêcheurs français. Pendant la guerre de l'indépendence des États-Unis, le gouvernement de Louis XVI remit en vigueur les anciens édits, et ordonna de ne point molester les pêcheurs anglais, ni en général les navires chargés de poissons frais à moins cependant qu'ils n'eussent des armes à leur bord, ou qu'on ne pût les soupçonner d'entretenir des intelligences avec des navires de guerre ennemis.

"§ 2370. Les annales du Conseil des prises de Paris ne nous ont fourni qu'un exemple saillant de l'application à un particulier des principes de législation que nous venons de rappeler: c'est celui de la barque de pêche portugaise *Nossa Senhora da Piedade*, capturée par le corsaire *la Carmagnole*. Le capitaine demanda sa relaxation, en alléguant qu'il était sorti du port de Peniche pour se livrer à la pêche du maquereau avec salaison à bord; que lui et les treize hommes de son équipage avaient employé à cette opération tout le

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Juridiction de la Marine imposed in this regard an absolute prohibition on the commanders of cruisers and privateers. If the ordinance of 1681 did not renew this prohibition and if the ordinance of 1692 caused the exception in favor of fishing boats to disappear by declaring them subject to confiscation, that as is known arose because of the violent conduct of the officers of the British navy who in defiance of the stipulation of treaties seized and destroyed the boats of French fishermen. During the War of Independence of the United States of America, the government of Louis XVI again put in force the ancient edicts and gave orders not to molest the English fishermen nor in general vessels laden with fresh fish unless they had arms on board or unless they were suspected of keeping up communications with vessels of war of the enemy.

"§ 2370. The annals of the Conseil des Prises of Paris have furnished us with but one striking example of the application in a particular case of the principles of legislation to which we have called attention. It is that of the Portuguese fishing vessel *Nossa Senhora Da Piedade* captured

temps qui s'était écoulé entre son départ et sa capture ; enfin qu'il avait été saisi à trois ou quatre lieues en pleine mer, à la hauteur de Tavira. Tous ces faits ayant été reconnus exacts, le commissaire du gouvernement requit la nullité de la capture, conformément aux précédents de la législation française et aux usages des nations civilisées. Le Conseil des prises, dans les considérants de sa decision, rappela *les principes d'humanité et les maximes du droit des gens*, et finalement invalida la prise de *la Nossa Senhora da Piedade*.

"§ 2371. Au commencement des guerres de la Révolution française, l'Angleterre ne suivit pas l'exemple donné par la France, et fit saisir et confisquer un grand nombre de bateaux pêcheurs français ou hollandais, dont les équipages furent traités comme prisonniers de guerre. Pourtant en 1799, après l'échange de plusieurs notes diplomatiques, la Grande-Bretagne révoqua son ordonnance de 1798, mais en déclarant que pour elle la liberté de la pêche n'était qu'un acte de pure tolérance, qui ne pourrait s'appliquer ni à la grande pêche ni au commerce des huîtres.

"§ 2372. Dans le cours de leur guerre contre le Mexique, les États-Unis permirent aux pêcheurs ennemis de continuer librement l'exercice de leur industrie. La France agit de même lors des guerres d'Orient, d'Italie et d'Allemagne, en interdisant à tous ses croiseurs, par mesure générale, de troubler en rien la pêche côtière, et de saisir aucune barque

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by the privateer *Carmagnole*. The captain demanded his release alleging that he had left the port of Peniche with pickle aboard to fish for mackerel. That he and the thirteen men of his crew had thus employed all the time which had elapsed between his departure and his capture and finally that he had been seized three or four leagues out on the open sea opposite Tavira. All these facts having been shown to be exact, the government commissioner advised the capture was null conformably to the precedents of French legislation and to the usages of civilized nations. The Conseil des Prises in the reasoning of its decision referred to the principles of humanity and the maxims of international law and finally declared the capture of the *Nossa Senhora Da Piedade* invalid.

"§ 2371. At the beginning of the wars of the French revolution England did not follow the example set by France and seized and confiscated a large number of French and Dutch fishing boats, whose crews were treated as prisoners of war. But in 1799 after the exchange of several diplomatic notes, Great Britain revoke l its ordinance of 1798 but declared

ou aucun bateau, à moins de nécessités commandées par les opérations militaires et maritimes. * * *

"§ 2373. Le privilége d'exemption de capture, qui est généralement acquis aux bateaux pêcheurs exploitant leur industrie à proximité des côtes, n'est dans aucun pays étendu aux navires qui se livrent en haute mer à ce qu'on appelle la grande pêche, telle que celle de la morue, du cachalot, de la baleine, du phoque et du veau marin. Ces navires sont en effet considérés comme adonnés à des opérations à la fois commerciales et industrielles."

The most recent practice or enactment on the subject is reported in *Takahashi's International Law During the Chino-Japanese War*. He quotes in full the prize law promulgated by the Emperor of Japan at the beginning of the war with China, of which chapter I, article 3 (p. 178), provides:

"The following enemy's vessels are exempt from detention:

"(1.) Boats engaged in coast fisheries."

The foregoing review of authorities clearly shows that both by law and by uniform practice coast fishing boats are exempt from capture so long as they devote themselves exclusively to fishing. Taking any part in belligerent operations or conveying information deprives them of exemption;

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that for it the freedom of the fisheries was an act of pure toleration, which could not be applied to the great fisheries nor to the oyster trade.

"§ 2372. In the course of their war against Mexico, the United States allowed the enemy fishermen to continue freely the exercise of their industry. France acted in the same way at the time of the Crimean war, the Italian war, and the German war in forbidding all its cruisers by a general order to disturb in any way the coast fisheries or to seize any vessels or boats unless made necessary by reason of military and maritime operations.

"§ 2373. The privilege of exemption from capture which is generally given to fishing boats plying their industry in the proximity of shore is in no country extended to vessels which are engaged on the high seas in what is called the great fisheries—such as that for the cod, the cachalot, the whale, the seal and the seal calf. These vessels are in effect considered as engaged in both commercial and industrial operations."

but the statement of this qualification serves only to emphasize the rule itself.

It does not appear that the size or class of the boat affects the application of the rule, nor that the coast on which fishing is done may not be that of the country to which the fishermen belong. It is the character of the work and of those engaged in it that gives rise to the right. "Coast fisheries" are referred to not as related to distances greater or less from the coast to the fishing grounds, but to distinguish the class of men and boats from those which fish in the far-off seas for whale, cachalot, cod, seal, and seal calf (4 *Calvo*, 5th ed., § 2373, p. 327).

It seems that the United States has hitherto followed the general rule, and the orders to acting Rear Admiral Sampson in the last war appear to recognize the rule in a message stating its limitation.

During the Mexican war fishing boats were granted immunity. Though the orders, if explicit orders were given, do not appear to be of public record, the fact is stated in all modern text books (*Lawrence*, p. 383; 4 *Calvo*, § 2372; Halleck, Baker's ed., vol. II, p. 106).

Snow, Naval War College Lectures (p. 97), states the present rule as follows:

"The question is brought up occasionally as to whether the boats and men employed in the coast fisheries of a belligerent State are free from capture and interference by an enemy. It has not been the rule to capture such boats and fishermen, though no exemption has been claimed for deep-sea fisheries, except by the inhabitants of Nantucket during our war of 1812."

In the war with Spain, and on April 30, after the captures in these cases, the Secretary of the Navy instructed the commander-in-chief of the North Atlantic squadron, in answer to an inquiry, as follows:

"WASHINGTON, *April* 30, 1898.

"SAMPSON, *Key West, Fla.:*

"Spanish fishing vessels *attempting to violate blockade* are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained.

"LONG."

(*Appendix to Report of Bureau of Navigation*, 1898, p. 178.)

It is believed that orders had previously been given not to capture fishing boats; but if given they have not been made public. That such orders were in existence, however, is to be inferred from the fact that the *Cincinnati* omitted to seize the *Lola*, and merely warned her of the blockade and allowed her to proceed to Bahia Honda, where she was captured by the *Dolphin* (Rec., Ans. to 29th Int.).

But whatever the private orders may have been as to fishing boats engaged or which were suspected to be about to engage in the enemy's service, they have no just application to the present cases. The facts show that these boats had been out fishing before war began and were returning, when captured, in complete ignorance of any hostilities. There was nobody on board whom the most suspicious officer could imagine would be of material assistance to the enemy even if possessed of anti-Cuban predispositions, which in the case of Cubans is not to be presumed. There is nothing in the records to suggest that the boats or their crews were in any respect different from those as to which a well-defined practice exists, and the President having especially invoked such practice for the guidance of all persons, including the courts, the vessels should receive the immunity it affords.

POINT SECOND.

AT THE TIME OF THEIR CAPTURE THE FISHING BOATS, AS THE PROPERTY OF CUBANS, WERE ENTITLED TO THE RIGHTS AND PRIVILEGES OF VESSELS BELONGING TO NEUTRALS OR ALLIES. THE PEOPLE OF CUBA HAD BEEN RECOGNIZED BY THE UNITED STATES AS FREE AND INDEPENDENT, AND HENCE THEIR PROPERTY COULD NO LONGER BE CONSIDERED AS HOSTILE.

(a.) The joint resolution of Congress approved April 20, 1898 (*post*, p. 61), declared "that the people of the island of Cuba *are*, and of right ought to be, *free and independent*." called upon the Spanish government to relinquish its authority and government in the island, and to withdraw its land and naval forces therefrom, and directed and empowered the President to use the land and naval forces of the United States, and to call into service the militia of the several States to such extent as might be necessary to carry the resolution into effect.

The three years' struggle in Cuba, referred to in the preamble of the resolution, is matter of common knowledge. On one side was ranged the power of Spain, represented by her army and naval forces, occupying most of the important centers of the island, including the capital, Havana; on the other, scattered corps of armed insurgents, occupying practically all the rural districts, supported and maintained by the sympathy and help of the overwhelming majority of the inhabitants, and particularly by the native-born Cubans. The attempt to throw off the yoke of Spain was watched with the keenest interest by the American people, and the joint resolution of Congress was but the culmination and expression of the public sentiment of this country.

The reference to the Cuban insurrection is made for the

purpose of arriving at an understanding of what was meant by the joint resolution. In the light of preceding events and actual public opinion, it clearly indicated that Congress sought to differentiate between the Spanish domination, and what stood for it, and the people of Cuba who were subjected to it and struggling against it. The former was to be done away with by force, if necessary; the latter were to be freed from their bondage. The two classes of inhabitants of Cuba—the Spanish army and navy on one side, and the Cuban people on the other,—were acknowledged to be and were placed in opposition to each other. One might become, and in the contingency actually did become, hostile to us; the other was protected and aided by us, and became our allies.

It cannot be conceived that those whom it was our policy and intention to protect and aid should suffer either in their persons or their property by reason of our warfare against the very ones from whose domination we sought to deliver them; that hostility against their oppressors should be made the excuse for further despoiling them.

So far as concerns our dealings with foreign powers, the recognition of a state of war, belligerency, or independence, the courts have no initiative or original power, but are controlled entirely by the position assumed by the legislative and executive branches of the Government.

It therefore becomes of importance to determine in what recognition consists, and when and how it may be expressed; for after the other branches of the Government have acted it is competent for the court, in determining questions of private right, to consider the quality or effect of the acts.

The text-writers and cases show that the status of a people or of some part of a people, in courts concerned with the application of the principles of international law, may be acquired in different ways.

"Recognition may be effected in various ways. The most formal mode is by express declaration, issued separately

and addressed to the new State, or by a declaration included in a convention made with it. * * * But any act is sufficient which clearly indicates intention" (*Hall, Int. Law*, part II, ch. 1, sec. 26).

"Referring to the term recognition, Mr. Canning stated in 1823 that 'the law of nations was entirely silent on this point,' but he attached this meaning to it: 'If the colonies say to the mother country, "We assert our independence" and the mother country answers "I admit it," that is recognition in one sense. If the colonies say to another State "We are independent," and that other State replies "I allow that you are so," that is recognition in another sense of the term. That other State simply acknowledges the fact or rather its opinion of the fact.'" * * * (*Baker's Halleck, Int. Law.*, vol. I, ch. 3, p. 85.)

"The act intended to recognize the independence of a colony or of a province is exclusively within the attributes of the executive power of each State," says *Calvo* (5th ed., sec. 93).

In *Gelston vs. Hoyt*, 3 Wheat., 322, the question arose out of a seizure made for an alleged violation of our neutrality laws in sending out a filibustering expedition to help the contestants in the Haytian civil war. Mr. Justice Story, in his opinion said:

"No doctrine is better established than that it belongs exclusively to governments to recognize new States in the revolutions which may occur in the world; and until such recognition either by our own government or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was especially held by this court in the case of *Rose vs. Himely*, 4 Cranch, 24, and to that decision we adhere."

No evidence of any governmental declaration concerning either contestant having been produced, the seizure was declared void.

In *U. S. vs. Palmer* (3 Wheat., 610) the question arose out of the prosecution as pirates of Palmer and others who attacked and plundered Spanish ships under a commission issued by the revolted South American colonies. The Supreme Court was called upon to decide:

"Whether any revolted colony, district or people, which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States as a sovereign or independent nation or power, have authority to issue commissions to make capture on the high seas of the persons, property and vessels of the subjects of the mother country; who retain their allegiance; and whether the forcible seizure with violence, and by putting in fear of the persons on board of the vessels, the property of the subjects of such mother country, who retain their allegiance on the high seas, in virtue of such commissions, is not to be deemed a robbery or piracy, within the provisions of the act of Congress."

Chief Justice Marshall (p. 634) said:

"Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. * * * The court will only observe that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new State absolutely—or may make a limited recognition of it. *The proceedings in courts must depend so entirely on the course of the Government* that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally,

that if the government remains neutral and recognizes the existence of a civil war its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful and would be to array the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department."

The Government having remained neutral in the conflict, the indictment was dismissed, rights of belligerency having been acquired.

In the *Divina Pastora* (4 Wheat., 52) the Spanish consul was the claimant of a vessel captured by privateers of La Plata. Chief Justice Marshall delivered the opinion of the court, saying (at p. 63):

"The decision at the last term in the case of the *United States vs. Palmer* establishes the principle that the Government of the United States, having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which new governments in South America may direct against their enemy. Unless the neutral rights of the United States, as ascertained by the law of nations, the acts of Congress and treaties with foreign powers are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country. If therefore it appeared in this case that the capture was made under a regular commission from the government established at Buenos Ayres, by a vessel which had not committed any violation of our neutrality, the captured property must be restored to the possession of the captors. But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners."

Williams vs. Suffolk Insurance Co. (13 Peters, 415) was an action on a policy of insurance, and the following question was certified to the Supreme Court:

"Whether inasmuch as the American Government has insisted and still does insist through its regular executive authority that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres and that the sea fisheries at those islands is a trade free and lawful to the citizens of the United States and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish, it is competent for the circuit court in this case to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of the said Falkland islands, and if such evidence authorizes the courts to decide against the doctrines and claims set up and supported by the American Government on this subject, or whether the action of the American Government on this subject is binding and conclusive on this court as to whom the sovereignty of those islands belongs."

The court held that the action of the executive department on the question to whom the sovereignty of those islands belonged was binding and conclusive upon the courts of the United States, Mr. Justice McLean, who delivered the opinion of the court, saying (p. 420):

"And can there be any doubt that when the executive branch of the Government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire nor is it the province of the court to determine whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and Government of the Union.

"If this were not the rule, cases might often arise in which on the most important questions of foreign jurisdic-

tion there would be an irreconcilable difference between the executive and judicial department. By one of these departments, a foreign island or country might be considered as at peace with the United States whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise and so destructive to national character.

"In the case of *Foster vs. Neilson* (2 Peters, 253) and *Garcia vs. Lee* (12 Peters, 511) this court have laid down the rule that the action of the political branches of the Government in a matter that belongs to them is conclusive.

"And we think in the present case, as the Executive in his message and in his correspondence with the government of Buenos Ayres has denied the jurisdiction which it has assumed to exercise over the Falkland islands, the fact must be taken and acted upon by this court as thus asserted and maintained."

In *Jones vs. The United States* (137 U. S., 202) the question turned on the jurisdiction of the United States over the island of Navassa. Mr. Justice Gray, who delivered the opinion of the court, used the following language (p. 212):

"Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances (*Gelston vs. Hoyt*, 3 Wheaton, 246; *United States vs. Palmer, idem*, 610; *The Divina Pastora*, 4 Wheaton, 52; *Foster vs. Neilson*, 2 Peters, 253; *Keene vs. McDonald*, 8 Peters, 308; *Garcia vs. Lee*, 12 Peters, 511; *Williams vs. Suffolk Ins. Co.*, 13 Peters, 415; *United States vs. Yorba*, 1 Wallace, 412; *United States vs. Lynd*, 11 Wallace, 632).

"It is equally well settled in England (*The Pelican*, Edwards' Admiralty Appendix; *Taylor vs. Barkley*, 2 Sim., 213; *Emperor of Austria vs. Day*, 3 De G. F. & J., 217; *Republic of Peru vs. Peruvian Guano Co.*, Law Rep., 36 Chancery Div., 489; *Republic of Peru vs. Dreyfus*, Law Rep., 38 Chancery Div., 348).

* * * "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer or of its recognition or denial of the sovereignty of a foreign power as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings (*United States vs. Reynes*, 9 Howard, 127; *Kennett vs. Chambers*, 14 Howard, 38; *White vs. Russell*, 117 U. S., 401; *Coffee vs. Groover*, 123 U. S., 1; *State vs. Dunwell*, 3 Rhode Is., 127; *State vs. Wagner*, 61 Maine, 178; *Taylor vs. Barkley* and *Emperor of Austria vs. Day*, above cited; 1 *Greenleaf's Evidence*, sec. 6)."

In the *Santissima Trinidad* (7 Wheat., 283) Mr. Justice Story said (p. 337):

"There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not yet been acknowledged by the executive or legislature of the United States, and, therefore, is not entitled to have her ships of war recognized by our courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties and to allow to each the same rights of asylum and hospitality and intercourse. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war and entitled to be respected in the exercise of those rights. We cannot interfere, to the prejudice of either belligerent, without making ourselves a party to the contest and de parting from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports under the laws of nations must be considered as equally the right of each, and as such must be recognized by our courts of justice until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this court, and we see no reason to depart from it."

The recognition of an insurgent body as belligerent, in the technical sense of the phrase, makes that insurgent body a state for all purposes of the war (*Lawrence*, secs. 162, 163; *Dana's Wheaton*, sec. 23, note; *Hall's International Law*, 4th ed., 32, 35–'7, and cases *supra*).

A fortiori, the recognition of the freedom and independence of a whole people must of necessity regard them as a State for all purposes of war, and the use of the expression "the people of Cuba" in the joint resolution of Congress must certainly have that effect.

In *Nesbitt vs. Lushington* (4 Term R., 783), a ship approaching the Irish coast was set upon by an Irish force for the purpose of seizing the ship and holding her until the captain should agree to sell them, at a stipulated price, the corn with which she was loaded. This they proceeded to do. The question arose whether the act was a restraint or detention by a "people" within the sense of those words as used in a policy of marine insurance. The court held that the word "people" did not apply to individuals, but to a Government—to nations in their collective capacity.

To the same effect, *The Itata*, 56 F. R., 505; *Morau vs. Ins. Co.*, 6 Wall., 1; *Marshall on Insurance*, bk. 1, ch. 12, sec. 5; 3 *Kent's Comm.*, 302, note *d*, 6th ed.

In the *United States vs. Quincey* (6 Peters, 445), Mr. Justice Thompson used this language (p. 467):

"The indictment charges that the defendant was concerned in fitting out the *Bolivar*, with intent that she should be employed in the service of a foreign people; that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the Executive Department of the Government of the United States, before the year 1827. And therefore it is argued that the word 'people' is not properly applicable to that nation or power.

"The objection is one purely technical and, we think, not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed, and it is one of the denominations applied by the act of Congress to a foreign power."

In the *Three Friends* (166 U. S., 1, 56) Mr. Chief Justice Fuller, speaking for the court, said:

"Of course, a political community *whose independence has been recognized* is a State under the act" (R. S., sec. 5, 283); "and if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized is also embraced by that term, then the words 'colony,' 'district,' or 'people,' instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise, and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded; and as agreeable to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent State, concedes to the government recognized the rights, and imposes upon it the obligations, of an independent State in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a government are not in aid of the State, in the sense of the statute."

And further (p. 63):

"But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."

Similar in effect are *The Hornet*, 12 Fed. Cas., 527; *U. S. vs. 129 Packages*, 27 Fed. Cas., 284; *Clark vs. U. S.*, 3 Wash. C. C., 101; *The James J. Swan*, 50 F. R., 108; *Underhill vs. Hernandez*, 168 U. S., 250; *The Conserva*, 38 F. R., 437.

Whether certain admitted acts or communications of the executive department do or do not amount, in legal effect, to the recognition of belligerency or of independence in a particular case is a matter for the court.

The exact point was before Judge Brown, of the New York district, in the case of the *Ambrose Light* (25 Fed. Rep., 408). That vessel was seized in the Caribbean sea by our naval forces and pursuant to our naval regulations for not having a proper commission on board, and was brought to New York and libeled by the Government as prize on the ground that under the law of nations she was a pirate.

Up to the day of the seizure the Colombian rebels, to whom she belonged, had not obtained recognition of their belligerency. The Colombian government had previously directed the attention of the United States to certain of its decrees, one of which proclaimed certain rebel ports closed to foreign commerce, and another of which declared, in substance, that rebel vessels then operating against Cartagena were irregular and unlawful, were flying the Colombian flag without authority, and might be repressed by the vessels of any other nation charged with watching its commercial interests as being beyond the pale of international law.

On the day the *Ambrose Light* was seized, Mr. Bayard, then Secretary of State, replied to these communications, declining to acquiesce in either of the decrees, and in the course of his dispatch used the following language:

"A decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extraterritorial effect in the direction imposing any obligation upon the governments of neutral powers to recognize it." * * * "Vessels manned by parties in arms against the government when passing to and from ports held by such insurgents, or even when attacking ports in possession of the Colombian government, are not pirates by the law of nations, and cannot be regarded as pirates by the United States."

It was contended by the claimants that these passages in Secretary Bayard's dispatch impliedly recognized the Colombian rebels as possessing belligerent rights, and that accordingly the vessel should be considered as the property of belligerents and restored. Judge Brown found that, but for this letter, the *Ambrose Light* would have occupied the position of a pirate, and would have been subject to condemnation; but he adopted the claimants' view that Secretary Bayard's letter impliedly recognized the Colombian rebels as possessing belligerent rights. That conclusion gave a legal status to the vessel as of the day of her capture, and a decree of restoration followed.

In dealing with that branch of the matter Judge Brown in his opinion (p. 44) said:

"The attitude assumed by our Government in these conclusions is of itself, by necessary implication, a recognition of the existing insurrection as constituting a state of civil war. It assumes that the Colombian government, as respects the ports in question, is a *belligerent;* that the insurgents hold those ports as a *de facto* power, to the exclusion, for the time being, of the Colombian government and of its sovereign authority; that they are in arms against the latter government; and it is declared that our Government will not recognize any attempt by the Colombian government to close these ports by virtue of its own sovereignty as lawful or valid; nor any closure, except by means of an effectual blockade, *i. e.*, by acts of war. In saying that it would recognize no rights of the Colombian government at those ports, except *belligerent* rights, our Government implies belligerent rights in those who hold those ports adversely."

Under these decisions there can be no doubt that had the Cubans possessed vessels flying a Cuban maritime flag and operating against Spanish vessels, we should have been bound to regard captures made by them as valid, in view of their recognition as independent. The direct and logical conclusion necessarily follows that we could not capture their vessels as hostile when our only enemy was Spain (*Talbot vs. Janson*, 3 Dall., 133; *Beawes, Lex Mercatoria*, 252).

(b.) Is there any doubt upon the proofs that the owners of these boats were "Cubans" in the sense of the resolution of recognition?

The owner of the *Paquete Habana* is Justa Galban, a widow (pp. 13, 14, 10). In answer to the standing interrogatories the master says, "She lives in Havana, and is a Spaniard by birth" (Ans. to 9th Int., p. 10). Presumably by this he meant only that she was born under Spanish rule, as in the test affidavit he states she is "a native-born Cuban, domiciled in Cuba at the time of the recognition of the independence of the Cuban people by Congress" (p. 14). It also appears elsewhere that she had resided in Havana and had owned the boat for at least five years before the capture (Ans'rs to 6th, 7th, and 9th Ints.). It is nowhere intimated that she was in any manner connected with the Spanish military and naval forces, which constitute the only classes of people the Congress declared should be removed from Cuba (Resolution, § 2, *post*, p. 62). Justa Galban resided, was domiciled, and owned property in Cuba, and was, on the evidence, a Cuban in the sense of the resolution of recognition.

The owner of the *Lola* is Severo Gonzales. "The owner lives in Cuba" (Ans. to 4th Int., p. 9). "He was born in *the* Spain and now lives in Havana, Cuba. He has lived there for a long time. * * * He has owned the boat about ten years" (Ans. to 9th Int., p. 10). In the test affidavit the master gives the owner's name as Sibors Gonzales and describes him as "a native of Cuba, domiciled in Cuba at the time of the recognition of the independence of the Cuban people by the Congress" (p. 13). It appears fairly, from both parts of the captain's evidence, that Gonzales had resided and was domiciled in Havana for many years.

Whether he was actually born there or in Spain does not seem entirely clear, nor is it material. The rights of the people, as Cubans, and the immunity of their property from capture, as that of enemies, is determined by the test of

domicile (*Twiss, Int. Law in Time of War*, § 152; *The Danous*, 4 C. Rob., 256, *note*; *The Ann*, 1 Dods., 221). Under these authorities long residence and domicile suffice to make a man a "Cuban." (See *post*, p. 57.)

Captain Pasos, of the *Paquete Habana*, has resided in Havana 14 years (Ans. to 1st Int., p. 9), and the other two members of his crew were shipped from there (Ans. to 5th Int.). All were Cubans (Claim, p. 13).

Captain Betancourt, of the *Lola*, has resided in Havana 21 years (Ans. to 1st Int, p. 9). The five seamen he hired at different ports (Ans. to 5th Int., p. 9). This must, of course, mean Cuban ports, since the vessel had been under his command for four years (Ans. to 4th Int., p. 9). He refers to them as Spanish subjects, by which, however, he means, as stated in the claim, "Cubans, who prior to the recognition of Cuban independence were Spanish subjects" (p. 13).

From these facts it appears to be a fair conclusion that the two-thirds interest in the fish, which belonged to the crew, was owned by persons properly to be described as Cubans within the meaning of the resolution of recognition (cases *supra*).

POINT THIRD.

NO PRESUMPTION OF HOSTILE CHARACTER CAN ARISE IN THESE CASES FROM THE MERE PRESENCE OF THE SPANISH FLAG.

In determining the national character of a vessel the flag, as an outward or visible symbol thereof, is taken into consideration, but it is merely one of many circumstances. The actual ownership, the nature of the cargo, the circumstances of the capture, etc., everything which can throw light upon the subject, are examined (*Del Col vs. Arnold*, 3 Dall., 333; *S. C. below*, 1 Fed. Cas., 1178; *The Harrison*, 1 Wheat., 298; *Wheaton Int. Law*, § 445; *El Telegrafo*, 25 Fed.

Cas., 1008; *The Arcola*, 24 Fed. Cas., 849; *The General C. C. Pinckney*, Blatchford's Prize Cases, 668).

The owners of these boats resided in Havana, where the boats were enrolled, and were directly under the eye of the central Spanish power on the island. Their Cuban birth or domicile is proved, but it would have been folly for the small owners of fishing boats to take an active part in rebellion openly, or attempt to fly the Cuban insurrectionary emblem. This would have been only to court confiscation by the Spanish authorities. The vessels therefore remained enrolled as they had been, and continued fishing in the same way as before the revolution—that is, under the Spanish flag.

By the answers to the standing interrogatories and the affidavits of the various claimants it appears that no bills of lading or charter-parties existed. The documents of the vessels apparently consisted only of a muster-roll, custom-house papers, and the crew list. Practically nothing, therefore, can be learned from a study of the ships' papers found on board, except that their paucity and character confirm the fact that these were mere fishing boats.

The cargo found on board, live fish, was of the most innocent nature. It was taken from the waters off the Cuban coast (*P. H.*, pp. 11, 14; *Lola*, p. 10) and was owned by the owners of the boats and by the crew, all of whom were Cubans.

The captures were made without any resistance and, in fact, without knowledge on the part of the captured that war had broken out, or that Cuban independence was a recognized fact.

In short, the presence of the Spanish flag is the only circumstance tending to impress upon these boats a hostile character. Of itself, that is insufficient. *Wheaton*, § 445, says:

"The neutral flag constitutes no protection to an enemy's property, and the belligerant flag communicates no hostile character to neutral property."

No Cuban maritime flag then existed, nor has a Cuban flag actually been recognized by our Government up to the present. Cuban vessels now use the American flag. When these vessels sailed on their voyages long prior to April 20th, the only course open was to fly the Spanish flag. A Cuban flag, then, would have been the badge of piracy. Moreover, a display of Cuban colors on these boats at any time would have meant their immediate confiscation by the Spanish authorities. It was the part of policy and prudence, therefore, as well as that of necessity, to fly the Spanish colors at all times prior to April 20th. Whatever the real sentiments of the owners were in regard to the rebellion, its presence alone cannot change the true character of the vessels.

The interesting case of the *Palme* (*post*, pp. 63, 65) is directly in point here. That vessel was seized as prize during the Franco-Prussian war by a French cruiser while on a voyage from Accra to Bremen, where she was registered. She was flying the German flag and all indications pointed to her German nationality. Evidence was introduced, however, which showed that the *Palme* was a German-built vessel; that in 1866 she was sold to the *Société du Commerce des Missions Protestantes* of Basel, a Swiss corporation, and that she still belonged to the société at the time of her capture, though she carried the German flag. It also appeared that the Swiss federal council did not permit Swiss subjects to fly the Federal flag, and that France had, in 1854, refused to acknowledge any Swiss maritime flag. Thus the société being compelled to sail its ships under some flag, that of Germany or, rather, of Hanover, had been retained. In order to do this the ship was nominally assigned to an agent of the society at Bremen (*Wheaton*, 2*d English ed.*, *sec.* 340*a*). The lower court confirmed the seizure, but on appeal to the council of state the decree was reversed and the property restored. The decision is printed in the appendix (*post*, pp. 63, 65).

Similar results were reached in *Del Col vs. Arnold* (3 Dall., 333) and in *The Mary* (9 Cranch, 126).

POINT FOURTH.

EVEN IF THE SPANISH FLAG WAS PRIMA FACIE EVIDENCE THAT THE BOATS WERE ENEMY PROPERTY, IT WAS NOT CONCLUSIVE OF THE FACT. THE OWNERS AT THE DATE OF THE CAPTURES WERE NEUTRALS, AND WERE ENTITLED TO A REASONABLE TIME IN WHICH TO COMMUNICATE WITH THEIR VESSELS AND REMOVE THE SPANISH FLAG; AND CAPTURES BEFORE THE LAPSE OF SUCH TIME ARE INVALIDATED BY PROOF OF THE REAL NEUTRALITY OF THE PROPERTY.

This principle is well established and has been acted upon by the Supreme Court repeatedly with respect to neutrals whose domicile suddenly became that of an enemy by outbreak of war, and is applicable to ownership in vessel property.

The *William Bagaley* (5 Wall., 377) was captured July 18, 1863. She had been documented by the Confederate States by a register issued at Mobile, and was captured in striving to break the blockade of Savannah. She was owned, principally, by Cox, Brainard & Co., of Mobile, but one Joshua Bragdon, a loyal citizen of Indiana, claimed a one-sixth share in the vessel through his partnership in that firm. In denying the claim to restoration of this interest because of laches, the court (p. 408) said:

"The omission of the appellant to dispose of his interest in the steamer, and his failure to withdraw his effects from the rebellious State, are attempted to be explained and justified because the same were, as alleged in the petition, confiscated during the rebellion under the authority of the rebel government. *More than a year, however, elapsed* after the proclamation of the blockade was issued before any such pretended confiscation."

And further (p. 410):

"The principle of the decision is that whoever embarks his property in shares of a ship is in general bound by the character of the ship, whatever it may be, and that principle is as applicable to a citizen, *after due notice and reasonable opportunity to dispose of his shares*, as to a neutral" (p. 410).

Another similar case is that of a blockade-runner which was captured between Mobile and Havana in December, 1863. The owner of the vessel, who had built her in Alabama, claimed her, asserting that he was loyal and was bringing her out of the enemy's country. The court disposed of the case adversely to the claimant by saying:

"If the allegations of the claimant are true, *he postponed his effort to escape too long to derive any benefit from it.* The law does not permit such delay."

The Gray Jacket, 5 Wall, 342, 368.

The implications from what was said in the above cases seem to be clear, and to the effect that had the claims been free from the charge of laches and properly proved, the court would have recognized and supported them.

In similar cases where claims were *bona fide*, they have been sustained (*The Onderneeming*, 5 C. Rob., 7, *note*; *The Indian Chief*, 3 C. Rob., 20; *The Snelle Zeylder*, 3 C. Rob., 21, *note*; *The Ocean*, 5 C. Rob., 91; *The Frances*, 2 Gall., 616; *The Juffrow Catharina*, 5 C. Rob., 141).

In the cases of vessels which have set out on voyages after a declaration of war it is settled that the court will not look behind the flag, even to see a neutral owner. The neutral in such cases has had, and has voluntarily relinquished, his right and opportunity to take the ship out from under the enemy's flag. Why should the court, after capture, do it for him?

But it is believed no case will be found, certainly no recent case, where a neutral ship has set out before war and without any opportunity on the part of her

owner to take her back under his own flag, has been condemned upon a refusal to inquire into the real facts of ownership. It would be contrary to the modern spirit to pounce upon a ship and condemn her, if she was *bona fide* neutral and had a really satisfactory explanation for being caught, without notice or knowledge of war, under an enemy's flag. Suppose such a neutral, on the first information of war, changed her back in good faith to the register of his own country, but could not reach the ship to advise the master, and for want of such knowledge the enemy's flag continued to fly until capture, over a boat which was in fact neutral, would a prize court, at this time, refuse to adjudge the neutrality, if satisfied of the facts?

Prize law, as a branch of the law of nations, should not be administered with a grudging recognition of real equities, much less with a total disregard of them; but liberally, equitably, and with due regard for the private rights of unfortunate persons of other nationalities, whose property, through no fault of their own, is proceeded against, and who themselves, if not actually neutral, at least are not enemies in any real sense.

This court, it should be said, has always been willing to examine a neutral claim, even before the doctrine that neutral goods are free under an enemy's flag became generally acknowledged. It was held that the court should examine into the fact of the alleged neutral claim to cargo and, if established, should restore it, whatever the result of the case was as to the ship (*The Frances*, 8 Cranch, 54; *The Mary*, 9 Cranch, 126; *The Neride*, 9 Cranch, 338; *The Science*, 5 Wall., 178; *El Telegrafo*, Newb., 383; 25 Fed. Cas., 1008; *The Harrison*, 1 Wheat., 298; *The Merrimack*, 8 Cranch, 316).

Another analogy may, perhaps, be invoked. Neutrals who continue to reside in an enemy country and trade there after an outbreak of war become tainted with an enemy

status, and their goods, if found afloat, may be seized as those of enemies.

But if within a reasonable time after war begins such neutrals take steps to close up their business and remove themselves and their property from the enemy country, the hostile character does not attach to them, and their property, if captured, will be restored as that of *bona fide* neutrals (*Twiss, Law of Nations in Time of War*, § 154; *The Frances*, 2 Gall., 616; *The Ocean*, 5 C. Rob., 91; *The Indian Chief*, 3 C. Rob., 20; *The Snelle Zeylder*, 3 C. Rob., 21, *note*). This principle was acted on by Judge Locke in the claim of Dussaq & Co., a French firm, at Havana, whose goods seized on the *Panama* were restored to them, and by Judge Brawley in relation to a similar claim by Carlos Armstrong, of Ponce, Porto Rico, whose goods were captured on the *Rita*, but subsequently restored. Both cases were decided without opinions.

In the cases now before the court the facts are peculiar and unprecedented. The analogies even of other cases are not precisely applicable. The evident equity and good faith of the claims, however, appeal to the favorable consideration of the court. The intention of the Congress would be clearly defeated if these poor fishermen are to be held as enemies with the like force and effect as the Spanish armed and naval forces, which alone in the resolution are treated as enemies. With the people of Cuba, the merchants, mechanics, artisans, farmers, coasting and fishing boat owners, and the lowly fishermen, this great nation had no quarrel. Why, then, should its national vessels be permitted to capture their property and itself to take a share of the proceeds? Individuals of the nation would be unwilling to do it. The claim of neutrality, if nothing else, should prevent the consummation of such a great wrong.

POINT FIFTH.

IF THE FACTS IN CONNECTION WITH THE DEFENSE OF IMMUNITY BY REASON OF CUBAN OWNERSHIP BE CONSIDERED AS IN DOUBT ON THE PREPARATORY EVIDENCE, THE COURT SHOULD ORDER FURTHER PROOF.

(a.) The rule with regard to further proofs is stated by Mr. Justice Story in his essay on the *Practice in Prize Cases* (1 Wheat., Appendix, pp. 494, 504) as follows:

"The most ordinary cases of further proof are where the cause appears doubtful upon the original papers and the answers to the standing interrogatories, and in such cases, if the parties have conducted themselves with good faith, and the error or deficiency may be referred to honest ignorance or mistake, the court will indulge them with time to supply the defects by the introduction of new evidence. But further proof is in no case a matter of right, and rests in the sound discretion of the court. Further proof is in all cases necessary, * * * in all cases where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence in general, induces any doubt of the proprietary interest, the legality of the trade, or the integrity of the transaction."

In the letter from Sir W. Scott and Sir J. Nicholl to Mr. Jay, then minister to England, dated September 10, 1794, outlining the jurisdiction and practice in prize cases, it is stated:

"Upon an appeal, fresh evidence may be introduced if, upon hearing the cause, the lords of appeal shall be of opinion that the case is of such doubt as that farther proof ought to have been ordered by the court below."

Upton, Marine Warfare and Prize (Appendix), p. 473.

Further proof may be allowed upon appeal as well as in the trial court. This court has frequently ordered new proofs where the right disposition of the cause was left in

doubt by the record (*The Sir Wm. Peel*, 5 Wall., 517, 534; *The Mary*, 9 Cranch, 126, 140; *The Frances*, 8 Cranch, 354; 9 do., 183; *The Venus*, 1 Wheat., 112; *The London Packet*, 2 Wheat., 372; *The Sally Magee*, 3 Wall., 451).

(**b.**) The Government appears to contend that no claim of Cuban ownership can be sustained without an allegation that the particular Cubans in question were in sympathy with and gave aid and comfort to the Cuban insurgents; and that as no statement of sympathy with or participation in the rebellion by these owners is made in the claim or test affidavit, an order for further proofs would be improper. There is no qualification of this kind, however, in the resolution. It recognized the freedom of all Cubans. The Congress was apparently willing to believe that those who had no opinions, or even adverse private opinions, on the subject of independence, if they were not allied with the Spanish armed or naval forces, would make good Cuban citizens, and in the finish would approve the actions of the United States.

The President, in a letter to the Secretary of War dated July 18, 1898, stated the war was not waged against any class of Cubans:

> "We come not to make war upon the inhabitants of Cuba, *nor upon any party or faction among them*, but to protect them in their homes, in their employments, and in their personal and religious rights."

But if sympathy for or active aid to the insurrection was necessary to constitute a man or woman a "Cuban," the absence of an allegation that these owners were that kind of Cubans should prove no bar to the introduction of evidence on the subject. It must be borne in mind that the pleadings in prize practice are most brief and informal. The libel merely avers the capture, and that the property belongs to enemies, and is lawful prize, while the claim merely sets forth the ownership, and denies that the prop-

erty is lawful prize. No answer is permitted to be filed; but any valid ground of exemption may be urged and proved under the general denial of prize contained in the claim. So here the issue of prize or no prize, raised by the claim, is sufficient to permit an inquiry on any branch of the claim of neutrality that the court may consider requires further investigation.

There is, perhaps, no impropriety in saying that if new proofs are ordered, the counsel for the claimants understand it will be made to appear that the claimants were in fact sympathetic with the rebellion and our action toward it, and that they and their families actually aided it so far as lay in their power.

POINT SIXTH.

THE RESTORATION OF THE PROCEEDS OF THE BOATS SHOULD BE ACCOMPANIED BY DAMAGES FOR WRONGFUL CAPTURE AND DETENTION.

Every capture is at the peril of the captors. Just grounds for the capture and detention must appear: otherwise the captors are liable for damages (The *Resolution*, 2 Dall., 1; The *Grand Sachem*, 3 Dall., 333; The *Charming Betsy*, 2 Cranch, 64; *Maley vs. Chattuck*, 3 Cranch, 458; The *Amiable Nancy*, 3 Wheat., 546; *British Consul vs. Thompson*, Bee, 142). If, however, there was probable cause for the detention, it is proper to submit the cause to the prize tribunal, which may refuse damages though it acquits the vessel (The *Olinde Rodrigues*, 174 U. S., 510; The *George*, 1 Mason, 26).

On the facts in these cases there was no probable cause for the captures: (*a*) because coast-fishing boats of this class are well known to be exempt from capture; (*b*) because the captures in any view were premature and contrary to recent practice, preceding, as they did, a notice of the existence of war (4 *Calvo*, 5th ed., p. 46); and (*c*) because it appeared from their papers, found on board, that they were Cuban

vessels, and the Cubans had been previously recognized as independent, and were then in substance and effect our allies, to the knowledge of those who effected the captures.

The cases are of peculiar hardship. The small owners (in one of the cases a widow) have suffered losses which would not be made good by the mere restoration of the proceeds of the sale of the boats. But small amounts were realized on the sales in Key West, where there was no demand for boats of this build, while the cost of replacing vessels supplied with large tanks for the preservation of the fish alive must plainly have been very large. Even an award of damages would not fully repair the injuries done; but, at the least, the fullest reparation possible should be made.

LAST POINT.

THE DECREES APPEALED FROM SHOULD BE REVERSED WITH DAMAGES AND COSTS; OR, IN THE ALTERNATIVE, AN ORDER SHOULD BE MADE FOR FURTHER PROOFS.

Respectfully submitted.

CONVERS & KIRLIN,
Proctors for Paquete Habana and Lola.

J. PARKER KIRLIN, *Advocate.*

WASHINGTON, *November* 4, 1899.

APPENDIX.

I.

RESOLUTION RECOGNIZING CUBAN INDEPENDENCE.

(Statutes at Large, vol. 30, part 2, p. 738.)

(No. 24.)—Joint resolution for the recognition of the independence of the people of Cuba, demanding that the government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited; therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled:

First. That the people of the island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

Approved April 20, 1898.

II.

ACT DECLARING THAT WAR EXISTS.

(30 Stat. at Large, part 2, ch. 189).

AN ACT declaring that war exists between the United States of America and the Kingdom of Spain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this act into effect.

Approved April 25, 1898.

III.

Conseil d' Etat 10 juin 1872.

(*La Palme.*)

Par décision du 9 février 1871, le conseil provisoire des prises de Bordeaux a déclaré de bonne prise, ainsi que sa cargaison, le navire *la Palme*, capturé le 15 janvier précédent, par l'aviso à vapeur *le Bouragne.*

Pourvoi devant le Conseil d'Etat, contre cette décision, par la société de commerce des Missions protestantes, ayant son siége à Bâle (Suisse) laquelle a soutenu qu 'elle était propriétaire du navire et de sa cargaison.

Le Président de la Republique Française, Etc.—Vu la lettre en date du 8 Sept., 1870, par laquelle le ministre de la Confédération suisse, à Paris, fait connaître au ministre des affaires étrangères, en lui demandant d'en avertir les croiseurs français que le navire *la Palme* et sa cargaison appartiennent à la société des Missions de Bâle, société dont les ressources proviennent de souscriptions volontaires recueillies dans toutes les parties de la Suisse: que le Conseil fédéral n'autorisant pas les navires appartenant à des Suisses à porter le pavillon fédéral, la Société des Missions a dû adopter, lors de l'achat du navire en 1866, le pavillon hanovrien, qui depuis a été remplacé par le pavillon allemand; Vu

une dépêche du ministre de la marine, en date du 29 déc, 1854, de laquelle il résulte qu'à cette époque le gouvernement français avait déclaré ne pas reconnaître à la Suisse le droit d'avoir en pavillon maritime que sa situation géographique ne lui permettait ni de surveiller, ni de protéger; Vu les pièces en date des 11 et 19 mars, 20 et 22 avril 1871, desquelles il résulte qu 'en considération, d'une part, des justifications de propriété produites par la Société des Missions de Bâle et de la nécessité où elle s'est trouveé de prendre un pavillon étranger; d'autre part, des circonstances particulières qui recommendaient à cette époque les sujets suisses à la bienveillance du gouvernment français, le commandant supérieur de la marine à Dunkerque a ordonné que le bâtiment serait remis à ses propriétaires, moyennant un cautionnement de 26,000 fr.; Vu les observations en date des 6 janvier et 16 avril, 1872, par lesquelles le ministre de la marine et le ministre des affaires étrangères estiment qu'en raison des circonstances tout exceptionnelles qui mettaient la société requérante dans l'impossibilité d'avoir un pavillon national, et en consideration des services rendus par la Suisse à une armeé française pendant la guerre, il convient de se départir vis-à-vis de la Société des Missions du droit qui appartient au gouvernement de déclarer de bonne prise tout bâtiment naviguant sous pavillon ennemi: Vu le reglement du 26 juillet 1778: Vu le décret du 28 avril 1856, portant approbation de la déclaration du 16 avril 1856. Vu la déclaration du 20 juillet 1870: Vu le décret du 29 sept 1870: Considérant qu'il est établi par l'instruction que le navire *la Palme* et sa cargaison appartenaient à la Société Protestante des Missions de Bâle: Que si le navire portait le pavillon allemand c'est parceque la Confédération suisse n'ayant pas de pavillon maritime, la Société des missions avait é'té obligée après avoir acheté le navire en 1866, de lui faire porter un pavillon étranger et de le faire immatriculer dans un port de mer sous le nom d'un de ses correspondants;—Que, depuis cette

époque, et notamment dans le dernier voyage, la société n'a employé le navire que pour ses relations avec les missions protestantes qu'elle entretient sur les côtes d'Afrique : Qu'en raison de les circonstances exceptionelles, et en consideration des services rendus par la Suisse à une armeé française pendant la guerre, il convient de se départir vis-à-vis de la Société des Mission Protestantes de Bâle, du droit qui appartient au gouvernement français de déclarer de bonne prise tout navire naviguant sous pavillon ennemi :—Art. 1er La décision attaquée est annuleé. Art. 2 Il est accordé décharge du cautionnement qui a été souscrit, et les sommes qui auraient pu être verseés à ce titre seront restitueés.

Du 10 juin 1872.—Comm. faisant fonct de cons. d'état.—M. Barbeau, rapp.

(Recueil Général des Lois et des Arrêts.—Sirey, De Villeneuve, et Carette 1873, II. 237.)

IV.

Council of State, 10th of June, 1872.

(*The Palme Translation.*)

By decision of February 9, 1871, the Provisional Prize Council of Bordeaux declared the ship *The Palme*, captured January 15 preceding by the steam dispatch boat *Bouragne*, good prize, together with its cargo.

Appeal to the Council of State against this decision by the Commercial Society of the Protestant Missions, having its seat at Basel (Switzerland), which affirmed that it was the owner of the vessel and its cargo.

The President of the French Republic, etc.: In view of the letter bearing date September 8, 1870, by which the minister of the Swiss Confederation at Paris makes known to the minister of foreign affairs in asking him to notify thereof the French cruisers that the ship *The Palme* and its

cargo belonged to the Society of Missions of Basel, a society whose resources are derived from voluntary subscriptions received from all parts of Switzerland, that as the federal council does not authorize vessels belonging to Swiss subjects to fly the federal flag, the Society of Missions had to adopt at the time of the purchase of the vessel, in 1866, the Hanoverian flag, which has since been replaced by the German flag. In view of a dispatch of the minister of marine, bearing date December 29, 1854, from which it appears that at that time the French government had declared that it did not recognize that Switzerland had the right to have a maritime flag which its geographical situation did not allow it either to watch or to protect; in view of the documents bearing date the 11th and 19th of March, 20th and 22d of April, 1871, from which it appears that in consideration on one part of the proofs of property presented by the Society of Missions of Basel and in the necessity in which it was to take a foreign flag; on the other part the particular circumstances which recommended at that time Swiss subjects to the good will of the French government, the superior commandant of the navy at Dunkirk ordered that the vessel should be restored to its owners upon the furnishing of a bond for 26,000 francs; in view of the observations dated January 6 and April 16, 1872, by which the minister of marine and the minister of foreign affairs state that by reason of the very exceptional circumstances which place the petitioning society in the impossibility of having a national flag and in consideration of the services rendered by Switzerland to a French army during the war, it is proper as concerns the Society of Missions to waive the right which belongs to the government to declare good prize all vessels navigating under the flag of the enemy; in view of the ruling of July 26, 1778; in view of the decree of April 28, 1856, approving the declaration of April 16, 1856; in view of the declaration of July 20, 1870; in view of the decree of Sep-

tember 29, 1870; considering that it is established by the inquiry that the ship *The Palme* and its cargo belong to the Protestant Society of Missions of Basel; that if the ship flew the German flag, it is because the Swiss Confederation, not having a maritime flag, the Society of Missions had been obliged, after having bought the vessel, in 1866, to have it fly a foreign flag and to have it registered in a seaport under the name of one of its correspondents; that since that time, and especially in the last voyage, the society has used the vessel only for its relations with the Protestant Missions, which it supports on the coast of Africa; that, by reason of these exceptional circumstances and in consideration of the services rendered by Switzerland to a French army during the war, it is proper, as concerns the Society of Protestant Missions of Basel, to waive the right which pertains to the French government to declare good prize all ships navigating under an enemy flag: Article first, the decision attacked is annulled; article second, the bond which has been furnished is discharged, and the sums which may have been paid under it will be restituted.

Of the 10th of June, 1872.—Committee exercising the functions of the council of State. M. Barbeau Rapporteur.

V.

STIPULATION TO ABIDE THE EVENT.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA.

THE UNITED STATES
against
THE PAQUETE HABANA.

THE SAME
against
THE QUATRE DE SETIEMBRE.

It is stipulated and agreed between the United States and the claimants of the above-named fishing vessels that the case of The United States against *The Quatre de Setiembre* shall abide the event of the appeal taken by the claimant in the case of The United States against *The Paquete Habana* (No. 395, October term, 1899), and that the appeal in said last-named case shall determine the right of the United States to the proceeds of the vessel in the other case.

It is understood and agreed, however, that should the decision of the Supreme Court in the case of the *Paquete Habana* be based in whole or in part upon the defense of Cuban ownership, it shall not be decisive of the rights either of the captors or of the claimants to the proceeds of the *Quatre de Setiembre* in so far as that defense may be involved in the latter case.

The time of the claimant to take and perfect his appeal in the case of The United States against the *Quatre de Setiembre* is hereby extended until one month after the decision of the Supreme Court of the United States upon the appeal taken in the case of The United States against the *Paquete Habana*.

It is further stipulated and agreed that this stipulation shall form a part of the record in both of the above-entitled cases.

Dated September 26, 1899.

EDWARD K. JONES,
Special Counsel for the United States.

CONVERS & KIRLIN,
Counsel for the Claimants.

VI.

STIPULATION TO ABIDE THE EVENT.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA.

THE UNITED STATES
against
THE LOLA.

THE SAME
against
THE ENGRACIA.

THE SAME
against
THE SEVERITA.

THE SAME
against
THE ANTONIO Y PACO.

THE SAME
against
THE FERNANDITO.

THE SAME
against
THE SANTIAGO APOSTOL.

THE SAME
against
THE ORIENTE.

THE SAME
against
THE ANTONIO SUAREZ.

THE SAME
against
THE ESPANA.

THE SAME
against
THE PODER DE DIOS.

It is stipulated and agreed between the United States and the claimants of the above-named fishing vessels that the cases of The United States against The Engracia, The Same against The Severite, The Same against The Antonio y Paco, The Same against The Fernandito, The Same against The Santiago Apostol, The Same against The Oriente, The Same against The Antonio Suarez, The Same against The Espana, and The Same against The Poder de Dios shall abide the event of the appeal taken by the claimant in the case of The United States against The Lola (No. 396, Oct. term, 1899), and that the appeal in said last-named case shall determine the right of the United States to the proceeds of the vessels in the other cases named.

It is understood and agreed, however, that should the decision of the Supreme Court in the case of the Lola be based in whole or in part upon the defense of Cuban ownership, it shall not be decisive of the right either of the captors or of the claimants to the proceeds of the vessels in so far as that defense may be involved in the other cases above named.

The time of the claimants to take and perfect their appeals in the cases of The United States against The Engracia,

The Same against The Severite, The Same against The Antonio y Paco, The Same against The Fernandito, The Same against The Santiago Apostol, The Same against The Oriente, The Same against The Antonio Suarez, The Same against The Espana, and The Same against The Poder de Dios is hereby extended until one month after the decision of the Supreme Court of the United States upon the appeal taken in the case of The United States against The Lola.

It is further stipulated and agreed that this stipulation shall form a part of the record on appeal in all of the above-entitled cases.

EDWARD K. JONES,
Special Counsel for the United States.
CONVERS & KIRLIN,
Counsel for the Claimants.

Dated September 26, 1899.

No. 395 and 396.
Sup. Ct. Brf. of Merlin for Oct. 1899.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

Filed Nov. 13, 1899.

The Spanish Smack "PAQUETE HABANA," JUAN PASOS, Claimant-Appellant,
AGAINST
THE UNITED STATES.
No. 395.

The Spanish Schooner "LOLA," THOMAS BETANCOURT, Claimant-Appellant,
AGAINST
THE UNITED STATES.
No. 396.

SUPPLEMENTAL BRIEF FOR CLAIMANTS-APPELLANTS.

(1.) JURISDICTION.

It was suggested upon the argument of these cases that if Section 695 of the Revised Statutes was still in force, the Court would be without jurisdiction to entertain the appeals, because of the fact that the amount in dispute in each case taken separately is not shown to exceed $2,000; and that the Court could not regard the stipulation, between the claimants and the Government, that ten other cases should abide the event of the above two, as effecting

such a consolidation as would bring the amount in dispute up to $2,000 within the meaning of the statute.

No question in regard to jurisdiction was raised in the original brief of the Government. Both sides assumed there was no controversy on this point. Further investigation, it is believed, will satisfy the Court that jurisdiction actually exists.

The Judiciary Act of 1891 (26 Statutes at Large, 828), establishing the Circuit Court of Appeals, and apportioning the appellate jurisdiction between that court and the Supreme Court, operated as a repeal of Section 695 of the Revised Statutes, in so far as it placed a limitation on the right of appeal to this Court in cases of prize.

This appears from a comparison of Sections 4, 5 and 14 of the Act of 1891.

Section 4 provides:

* * * "But *all appeals* by writ of error or otherwise *from said District Courts shall only be subject to review in the Supreme Court* of the United States, or in the Circuit Court of Appeals hereby established, *as is hereinafter provided*, and the review by appeal by a writ of error or otherwise from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established according to the provisions of this act regulating the same."

Section 5: "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

(1.) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

(2.) From the final sentences and decrees in prize causes.

(3.) In cases of conviction of a capital or otherwise infamous crime.

(4.) In any case that involves the construction or application of the Constitution of the United States.

(5.) In any case in which the constitutionality or any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

(6.) In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

Section 14, after expressly repealing Section 691 of the Revised Statutes, and Section 3 of the Act of February 16, 1875, concludes:

"And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding Sections 5 and 6 of this act are hereby repealed."

The only cases in which the jurisdiction of this Court as stated in that act is made to depend upon the amount involved are those under Section 6, in which an appeal to the Circuit Court of Appeals is allowed, but where the judgment of that Court is not made final. In such cases there is of right an appeal or writ of error to this Court where the matter in controversy exceeds $1,000, besides costs.

There is no limitation upon the exercise of the different branches of jurisdiction conferred on this Court by Section 5 by reason of the amount in controversy.

In cases where the jurisdiction of the Court is in issue, or which involve the construction or application of the Constitution, or where the constitutionality of the law of the United States, or the validity or construction of a treaty made under its authority is drawn in question, or where the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States, this Court has jurisdiction of appeals or writs of error, irrespective of the amounts in controversy.

The second of the six divisions of jurisdiction conferred under the fifth section of the Statute, is appeals from the District Courts in prize cases.

It is very unreasonable to suppose Congress intended that in five out of six classes of cases the amount in controversy should be immaterial, as affecting the jurisdiction,

while in the one other class of cases, covered by the same section of the act, the jurisdiction should be limited to appeals in which the sum in controversy exceeds $2,000—a different limit than that provided under the sixth section of the same act for cases in which there is a right of appeal to this Court from the Circuit Court of Appeals.

The general subject appears to have received consideration in the case of the *United States* v. *Rider*, 163 U. S., 101, 138, 139, where the Chief Justice, after reviewing the Court of Appeals Act, used this language:

"Thus appellate jurisdiction was given in all criminal cases by writ of error either from this Court or from the Circuit Court of Appeals, *and in all civil cases by appeal or error without regard to the amount in controversy*, except as to appeals or writ of error to or from the Circuit Court of Appeals in cases not made final, as specified in Section 6."

Section 695 of the Revised Statutes, we submit, is within the general repealing clause of Section 14 of the Act of 1891, as "inconsistent with the provisions for review by appeals * * * in the preceding sections five and six of this Act."

Section 4 provides "that all appeals * * * from said District Courts shall only be subject to review in the Supreme Court * * * as is hereinafter provided."

And Section 5 provides "that appeals * * * may be taken from the District Courts * * * direct to the Supreme Court, in the following cases:

(2.) "From the final sentences and decrees in prize causes."

The provision of Section 4 that "appeals from the District Courts should only be subject to review in the Supreme Court, as is hereinafter provided," plainly means that they *shall* be subject to review *as therein* provided; and the provision of the fifth section that appeals may be taken from the District Court direct to the Supreme Court "from the final sentences and decrees in prize causes" can only mean, in the ordinary use of language, from *all* such final sentences and decrees.

The specific grant of jurisdiction to this Court of appeals from all final sentences and decrees in prize causes, is plainly inconsistent with Section 695, which limited the jurisdiction of this Court in such cause to those where the amount involved exceeded $2,000, and hence Section 695 falls under the ban of Section 14 of the Act of 1891, and is, by that section, repealed.

(2.) WHO ARE "THE PEOPLE OF THE ISLAND OF CUBA"?

As a further word on this subject has been said in the supplemental brief for the Government and the captors, the appellant may perhaps be permitted a few further observations on the same subject.

It has been argued in the principal brief for the appellants that the "people of the Island of Cuba," as referred to in the joint resolution of the Congress, recognizing their freedom and independence, were the ordinary commercial inhabitants of the Island regularly residing and domiciled there on April 20, 1898.

The Spanish armed and naval forces are not properly to be described as persons residing or domiciled in the Island, and hence, by this test alone, would be excluded from the privileges and immunities properly belonging to the people of the Island, by reason of the recognition of their independence.

By this test, there could be not a doubt that the owners of the above smacks are Cubans in the sense of the resolution. To begin with, it is sworn in the test affidavit that these owners are Cubans, and it is the special function of the test affidavit to declare the nationality and residence of the claimants. It further appears from the preparatory evidence that the owners of the vessels were domiciled and resided for many years in Cuba, and *prima facie*, at least, that they were commercial as distinguished from military or naval people.

Certainly there can be no question of the non military character of Justa Galban, widow, the owner of the *Paquete Habana*, nor, as we submit, is there any reasonable question as to Severo Gonzales, the owner of the

Lola. He had been the owner of this boat for at least ten years and had resided in Havana during that time, if not longer.

Neither of the boats had Spanish Royal Licenses.

Both had merely insular licenses granted by the authorities in Cuba authorizing the boats to fish only upon the coasts of Cuba or upon coasts of the near neighboring countries (see Original Licenses in the Muster Rolls on file). Both of the boats had been built in this country, and there is no suggestion that either of them had ever seen Spain.

The boats, therefore, were Cuban vessels and the owners, by residence and domicile, were Cuban people.

The statements of the captains in the preparatory evidence, that the owners were Spaniards, should be read in the light of the facts that the boats had left Cuba on their fishing trip before Cuban independence was recognized; that they were captured by the blockading squadron and kept prisoners of war until after they were examined upon the standing interrogatories, and hence were ignorant of any change of the legal status of the people of Cuba, and gave their answers without having benefit of counsel. It should also be carried in mind that the same witnesses stated the *facts* of residence and domicile in the preparatory evidence, and that the statement that the owners were Spaniards was not the evidence of a fact, but was a legal conclusion given in ignorance of a vital and essential fact upon which the answers ought to have been based.

It is further apparent from the evidence of the captains that their statements that the owners were Spaniards were based upon the fact that one or both of them was born in Spain. But it seems plain that in determining who are or who are not "people of the Island of Cuba" the test of nativity cannot be applied, whatever other test may be. To limit the scope of the words "the people of Cuba" to those who are born in Cuba, would be to deprive a vast number of the inhabitants of that Island of the status Congress evidently intended to confer upon them.

Nor, it is submitted, should a state of mind be the test of whether a person is or is not a Cuban. The Government maintains that only those persons who were in sympathy with the insurrection, or with the action of this Government towards it, should be considered as entitled to the privileges which attach to Cubans under the resolution. In case of a conflict of evidence as to whether persons were or were not sympathetic with the revolution, it would be impossible for the Court to read the minds and consciences of those claiming to be Cubans, in order to determine the truthfulness of their claims.

Though it is believed that the owners of these vessels, like the owners of the other coasting vessels who were referred to on the argument, *were* sympathetic with the Revolution and its aim, and that leave to take further proofs would in these cases, as in the others, lead to evidence of the fact, it is, nevertheless, submitted with all possible deference, that the proofs of residence and domicile already in the records are sufficient to establish the status of these claimants as Cubans. In the case of the *Paquete Habana*, at least, it would be a hardship to impose the burden of further proofs.

(3.) THE IMMUNITY OF FISHING SMACKS UNDER THE GENERAL LAW.

Counsel for the claimants have received from the Government a copy of an additional memorandum submitted to the Court on November 11th, in which the orders of the Navy Department respecting the immunity of fishing vessels during the Mexican War appear. These orders are in a volume of confidential correspondence in the library of the Navy Department and are as follows:

"U. S. SHIP CUMBERLAND,
OFF BRAZOS, SANTIAGO,
May 14, 1846.

"Sir * * * Enclosed is a copy of my instructions to the commanders of vessels of the Home Squadron show-

ing the principles to be observed in the blockade of the Mexican ports.

"I am, very respectfully, etc.,
"D. CONNER,
"Comd'g Home Squadron.

"Hon. GEO. BANCROFT,
"Secretary of the Navy,
"Washington.

"*Enclosure.*"

"(*Instructions to be observed by officers commanding vessels*, &c.)

"Sir * * * Mexican boats engaged exclusively in fishing, on any part of the coast will be allowed to pursue their labours unmolested. * * *

"D. CONNER,
"Comd'g Home Squadron.

"U. S. SHIP CUMBERLAND,
"OFF BRAZOS, SANTIAGO,
"May 14, 1846."

"*Approved by the Department, June* 10, 1846."

It appears from the foregoing that the statements in the standard international law books respecting our practice during the Mexican War are correct.

The order of Commodore Stockton referred to in the report of the Secretary of the Navy for 1846 (Navy Reports, 1846–1848, pp. 673, 674): "You will capture all vessels under the Mexican flag that you may be able to take"—was either issued prior to the approval of the Department on June 10, 1846, of Commander Conner's order granting immunity to fishing vessels, or, if actually dated later (the report is not accessible to counsel for claimants), it must be deemed to relate to vessels other than fishing boats.

The only further reference we would add to the authorities respecting the immunity of coast fishing vessels from capture, under the rules of Internationl Law, is 3 *Wharton's International Law Digest*, Sec. 345, p. 316, where, by implication at least, he recognizes the existence of the general rule.

It is not necessary that the claimant should be able to cite an adjudicated case holding that the principle con-

tended for is a rule of International Law; though, happily, we have been able to so (Original Brief, p. 14). In a certain sense, there is no positive sanction for the rules of international law as there is for principles of municipal law. Long observance of a rule or custom, its embodiment in treaties, its recognition in the standard text books on International Law, and the justice, equity and convenience of a principle establish it as a rule which the Court, in a case involving private rights, may recognize and enforce. If this were not so, there could be no advancement in the principles of International Law except by the great Conferences of the Powers and by the most formal public Conventions; and these, we know, are by no means the only sources from which such principles are derived.

November 11, 1899.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimant.

J. PARKER KIRLIN,
Advocate.

No. 395 and 396.

(Brf. of Kirlin for Opps. (on mo.)

IN THE SUPREME COURT OF THE UNITED STATES.

Filed Jan. 22, 1900.

OCTOBER TERM, 1899.

The Spanish Smack PAQUETE HABANA, JUAN PASOS, claimant, appellant,

AGAINST

THE UNITED STATES.

No. 395.

The Spanish Schooner LOLA, TOMAS BETANCOURT, claimant, apppellant,

AGAINST

THE UNITED STATES.

No. 396.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF OPPOSING MOTION TO MODIFY DECREES.

. The Solicitor General moves "to modify the decrees in these causes (*a*) by vacating the allowance of damages, or (*b*) so restricting such allowance as to make the damages merely compensatory."

(*a.*) No argument is now addressed to the Court against the allowance of damages that was not heard at the bar

on the hearing. That matter having had its day in Court, and having been decided, upon an exhaustive examination of authorities, which being accepted, could lead to no other logical result, nothing remains to be said upon it.

(*b.*) The second branch of the motion is, in substance, an invitation to the Court to announce, beforehand, the principles upon which the District Judge shall proceed in determining the amount of the damages.

The answer to that part of the application seems to be that it is premature. It must be assumed that the District Court is competent to ascertain and determine the amount the claimants have been damaged by an unauthorized capture. But if an error should be committed, there will be a remedy by a review of his decision for the correction of such error.

Objection is made to any modification of the decree, providing that the restoration of the proceeds, with an allowance of interest, shall be accepted as full compensation. The Court in Florida will be in a better position than this Court to determine whether thatrule would afford indemnity, because it can hear evidence as to whether the proceeds of sale came anywhere near equaling the real value of the boats. It is probable they did not, because there is no demand for such boats at Key West, or market for their fish if they were employed in the former trade. It has been reported that the boats were bought at Key West for trifling sums,and sold to Cubans again at the close of the war for far larger amounts than they yielded to the Prize Court. It is not asserted here that such is the fact; but it has been stated in a public way by others, and the Court below should be left free to investigate it. That Court can easily adjudge, after hearing the evidence and without any preliminary instructions, whether the proceeds of sale fairly represent the value of the vessels or not. If they do not, then surely the United States would not wish to force the claimants to accept such proceeds as compensation for a greater loss.

The Government was not at war with inoffensive Cuban fishermen, and should not object, but on the contrary

should be willing and eager to make good to them their real losses by reason of the unlawful captures, if such proceeds and interest would, in fact, be insufficient to do so.

January 20, 1900.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Appellants.

J. PARKER KIRLIN,
Advocate.

IN THE

Supreme Court of the United States.

THE SPANISH SMACK *Paquete Habana*, JUAN PASOS, Claimant, *Appellant.*	No. 395.
THE SPANISH SCHOONER *Lola*, TOMAS BETANCOURT, Claimant, *Appellant*, *v.* THE UNITED STATES.	No. 396.

Brief on Behalf of Captors in Support of Decrees of Condemnation.

The brief filed by the Assistant Attorney-General on behalf of the United States in this case discusses very fully the status of the vessels in question in these cases. This point is covered by the second assignment of error (Record in No. 395, p. 21; in No. 396, p. 16).

We now beg leave to submit some remarks on the third assignment of errror (Record in No. 395, p. 21; in No. 396, p. 16), which is in the following words:

"Third. For that the court omitted and refused to hold that the vessels and cargoes were the property of Cubans, whose freedom and independence was recognized by the joint resolution of Congress approved April 20th, 1898, and entitled accordingly to exemption from capture as the property of neutrals, or persons entitled to the rights, privileges, and immunities of neutrals."

By this assignment it is understood that learned counsel for appellants maintain that property belonging to citizens and residents of the Island of Cuba can not be

regarded as impressed with a hostile character since the 20th of April, 1898, upon which day it was enacted by joint resolution No. 24, 30 Stat. L. 738, par. 1, "that the people of the Island of Cuba are, and of right ought to be, free and independent."

The exact legal status of the Island of Cuba in international law since the destruction of Spanish authority there may not be easy of definition. The rule of international law, however, as to the enemy character as impressed upon property is an exceedingly practical one. It attributes the character of enemy property to that property which is owned by one domiciled in the enemy country, even though his personal citizenship may be neutral. So, too, the property of a house of trade established in the enemy's country is regarded as hostile, even though some or all of the partners are citizens, and even residents, of a neutral state. The character, too, of the country where the property belongs is regarded as hostile or otherwise, not according to the exact legal character of the sovereignty of the country, but in accordance with its actual occupation and control. This rule and its reason are nowhere better stated than by Hall, International Law, § 167, from which we quote:

"With these reasons of a merely practical nature the effects of sovereignty, or in other words, of the authority which a state exercises over foreigners within its territory, combine to prevent the attribution of enemy character from corresponding exactly with the fact of national character. A foreigner living and established within the territory of a state is to a large extent under its control; he can not be made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of a war may demand. His property being thus an element of strength to the state, it may reasonably be treated as

hostile by an enemy. Conversely, when the foreigner lives in a neutral country, he is so far subject to its sovereignty that it can restrain him from taking advantage of its territory to do acts of hostility against the enemy of his state, and it is responsible for his acts, if he does them. For the purposes of the war, therefore, he is in reality a subject of the neutral state. Finally, if property be regarded separately, although on the one hand it can not escape from the consequences of enemy ownership, it may, on the other, be necessarily hostile by its origin irrespectively of a neutral national character of its owner, and it is also capable of being so used in the service of a belligerent as to fall completely under his control, and to become his for every purpose of his hostilities."

This principle was applied in this court in the case of *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch, 191. The Island of Santa Cruz, belonging to Denmark, was subdued and occupied during the War of 1812 by the British. It was afterwards restored to Denmark, and Great Britain never held any rights in it except those of military occupation. The property in question in the case was the produce of the island, and belonged to a subject of Denmark, who withdrew from the island when it became British and therefore could not be considered personally hostile. Chief Justice Marshall in delivering the opinion of the court said (p. 195):

"Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The Island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark."

In accordance with this view the property was condemned as enemy property.

A similar view was taken by this court in prize cases arising out of the Civil War. In the *Prize Cases*, 2 Black, 635, it was said of the territory held by the insurrectionary government (p. 674):

"All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

"But in defining the meaning of the term 'enemies' property,' we will be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.' It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

"Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. (8 Cr. 384.) The owner, *pro hac vice*, is an enemy.' (3 Wash. C. C. R. 183.)

"The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory."

And the same principle was applied in the case of The *Cheshire*, 3 Wall. 231, where the property of a house of trade established at Savannah, Georgia, was held subject to condemnation as enemy property, although some of the partners were citizens and residents of Great Britain.

The application of these principles to property owned

in Cuba during the late war with Spain removes all doubt as to the status of such property. Cuba was in fact hostile territory. It was so treated by our Government throughout. Paragraph 2 of the same joint resolution upon which reliance is placed as declaring the independence of Cuba, declares (30 Stat. L. 738):

"Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters."

This provision recognizes an existing authority and government on the part of Spain in the Island of Cuba.

Paragraph 3 of the same resolution provided (30 Stat. L. 339):

"Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect."

Thus it was recognized that force would be required to dislodge the existing Spanish authority and government in Cuba. The refusal of Spain to accede to the demand for the relinquishment of her authority was on the next day followed by the outbreak of war as declared by act of April 25, 1898, 30 Stat. L. 364. The proclamations of blockade of the ports of Cuba, dated April 22, 1898, and June 27, 1898, 30 Stat. L. 1769, 1776, were justifiable only as war measures, and proceed throughout upon the theory that Cuba is hostile territory. Spain's authority in fact continued in the island, and was recognized by our Covernment as continuing, until the pro-

tocol of August 12, 1898, 30 Stat. L. 1742, by Article I of which Spain agreed to "relinquish all claim of sovereignty over and title to Cuba"; and by Article IV agreed to "immediately evacuate Cuba, Porto Rico and other islands *now under Spanish sovereignty* in the West Indies." The evacuation of the island was to be arranged in all its details under provisions made in the same article (IV) of the protocol, 30 Stat. L. 1743, as well as by Article I of the treaty of peace of December 10, 1898, 30 Stat. L. 1754, 1755.

Calvo Droit International, 5th edition, Vol. IV, Book 2, section 2, in treating of enemy character makes these remarks, which we quote and translate as applicable to the case:

"§ 1950. It should, however, be observed that in principle the cession of a portion of territory by way of treaty does not destroy of right and instantly the national character and the bonds of political allegiance. This double change is only legally realized at the moment of the delivery and the receipt effected in the solemn forms usual in similar cases of territory ceded by treaty.

"§ 1951. This principle was applied by the British Court of Admiralty to the capture made by an English cruiser shortly after the cession of Louisiana by Spain to France of a vessel belonging to a merchant of New Orleans, which was entitled to be regarded as enemy property if its owner was a French subject and as neutral property if its owner was still a Spanish subject. The judge, Sir William Scott, decided that the capture should be invalidated and the ship restored to her owner, on the ground that there did not exist sufficient and satisfactory proof of the actual delivery to any French authority of the ceded territory, this delivery not yet having been surrounded with the formalities legally required."

The reference in this passage is to the case of The *Fama*, 5 C. Rob. 106, where the grounds of the decision are thus summarized (p. 118): "I am of opinion, therefore, that

on all the several grounds of reason, of practice and judicial recognition until possession was actually taken the inhabitants of New Orleans continued under the former sovereignty of Spain."

This principle precisely covers the case before the court, for, no matter how grievous were the wrongs done by Spain in the Island of Cuba, nor how well founded were the grounds for the interposition of our government for the removal of the Spanish yoke, yet in point of fact the Spanish dominion still continued there at the date of these captures, and all marine property having its situs in the ports of the island was under Spanish control and capable of being made available by the Spanish authorities for hostile purposes. It is this practical situation of the property to which international law alone looks as determining its character. That character being hostile, the property was rightly condemned, and it is submitted that the decrees to that effect should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
Solicitors for Certain Captors.

No. 395 & 396.

Brief of Captors

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 7, 1899.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PARSON, CLAIMANT, APPELLANT,
vs.
THE UNITED STATES. } No. 395.

THE SPANISH SCHOONER "LOLA," TOMAS BETENCOURT, CLAIMANT, APPELLANT,
vs.
THE UNITED STATES. } No. 396.

Appeal from the District Court of the United States for the Southern District of Florida.

BRIEF FOR THE CAPTORS.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for Captors.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PASOS, CLAIMANT, APPELLANT, *v.* THE UNITED STATES. } *No.* 395.

THE SPANISH SCHOONER "LOLA," TOMAS BETANCOURT, CLAIMANT, APPELLANT, *v.* THE UNITED STATES. } *No.* 396.

BRIEF FOR CAPTORS.

These are appeals from decrees of the District Court of the United States for the Southern District of Florida, by which the Spanish vessels *Lola* and *Paquete Habana* were condemned as prizes of war. By stipulation of the parties made with the approval of the prize court, it was agreed that the case of one other vessel, condemned, should abide

by the result of the appeal in the case of the *Paquete Habana*, and that the disposition of nine other vessels, condemned, should abide by the result in the case of the *Lola*.

STATEMENT OF FACTS.

The "Paquete Habana."

This vessel was owned by Justa Galban, a Spanish subject and a resident of Havana. She sailed under the Spanish flag and had a fishing license issued by the Spanish government (pp. 9 and 10). Her master and crew, consisting of two seamen, were Spanish subjects and residents of Havana. Her length was about 43 feet and her burden 25 tons. For several years she had been engaged in fishing in the Gulf of Mexico. In accordance with what appears to have been a custom prevailing in this business, the crew on each voyage divided the catch with the owner, two-thirds of it going to the crew and one-third to the owner. Customarily the voyages of the *Paquete Habana* had begun at Havana and, after proceeding to the fishing grounds and making her catch, she would return thither to sell her fish. Her last voyage began at Havana, on March 25, 1898. She proceeded to Cape San Antonio, the western extremity of Cuba, and remained in its vicinity fishing for twenty-five days; then started on her return to Havana with a cargo of about forty quintals, or 8,816 pounds, of fish. On April 25th she was captured by the U. S. S. *Castine*, eleven miles off Havana, while steering her course for that port, and was sent to Key West in charge of a prize crew.

She and her cargo were libeled on May 13. No claim was presented on behalf of the owners. The cause was

heard upon the libel and the deposition of Juan Pasos, her master, which had been taken *in preparatorio* and a decree of condemnation was entered on May 26. On May 28, Pasos appeared for the owners of the vessel and her cargo, and on his motion this decree was set aside and leave given the claimant to file a claim and test affidavit. The case was heard on May 30 and a second decree of condemnation entered. Pursuant to the order of the court, she was sold at public auction for $490, which sum was deposited with the Assistant Treasurer of the United States at New York, to be disposed of according to law (p. 16).

THE "LOLA."

This was a Spanish vessel owned by Severo Gonzales, a Spanish subject and a resident of Havana. She sailed under the Spanish flag, but had no patent or license. Her crew consisted of a master and six seamen, all residents of Cuba, and all Spanish subjects. Her length of keel was given by the master as 51 feet. In his deposition taken *in preparatorio*, he gave her burden as 55 tons (p. 9). Subsequently, in his test affidavit (p. 13), he placed it at 35 tons. For some years the *Lola* had been engaged in fishing in the Gulf of Mexico. On such voyages it had been customary for the owner and crew to divide the vessel's catch, two-thirds going to the crew, and one-third to the owner. She had sailed from Havana and returned thither to sell her fish. Her last voyage began at Havana on the 11th of April, 1898. She proceeded to Campeche Sound, off the peninsula of Yucatan, and remained there fishing for eight days (p. 13). Her catch amounted to about 10,000 pounds. With this cargo, she started on her return voyage to Havana. On April 26 she was stopped by the U. S. S. *Cincinnati*, and warned

not to attempt to enter that port. She then changed her course and on April 27 was steering for Bahia Honda when captured by the U. S. S. *Dolphin*, and sent to Key West in charge of a prize crew. She and her cargo were libeled on May 18, 1898. No claim was presented on behalf of the owners of the vessel or cargo. The case was heard upon the libel and the deposition of Tomas Betancourt, her master, taken *in preparatorio*, and a decree of condemnation was entered. On May 28 this decree was set aside on motion of the present claimant, who appeared on behalf of the owners. After hearing, a second decree of condemnation was entered (p. 14). The vessel was sold pursuant to an order of court, for $800, which sum was deposited with the Assistant Treasurer of the United States at New York, to the credit of the prize court (p. 15).

In both cases the claimants contend that the prize court erred in declining to rule: (1) That under the terms of the President's proclamation of April 26, 1898, fishing vessels were exempt from capture as prize of war: (2) That under the terms of the joint resolution of the United States Senate and House of Representatives, approved April 20, 1898, which recognized the freedom and independence of Cuba, the vessels and their cargoes were the property of neutrals or persons entitled to the rights, privileges, and immunities of neutrals, and (3) In refusing to order further proofs.

ARGUMENT.

I.

No provision of the President's proclamation of April 26, 1898, extended to enemy vessels like the "Lola" and the "Paquete Habana" exemption from capture.

The claimants base their plea of immunity from capture upon the second paragraph of the preamble of the proclamation. This recited that

> "Whereas it being desirable that such war be conducted upon principles in harmony with the present views of nations and sanctioned by recent practice, it has already been announced that the policy of this Government will not be to resort to privateering, but to adhere to the rules of the Declaration of Paris."

It is evident that the President did not intend to set out in the preamble the rules prescribed for the conduct of the war. It merely stated the motive which prompted the adoption of the rules declared and proclaimed in the six articles of the proclamation. None of these dealt with the treatment of fishing smacks and coasting vessels. They were left to share the risks and liabilities of belligerents, along with other enemy property, found upon the high seas.

In some instances the navies of belligerent states have not made captures of small open boats, engaged in fishing, close to the enemy's coast. This course has been adopted from motives of expediency as well as humanity. The value of such small craft, with their catches of fish or cargoes, is insignificant. Naval warfare is usually waged

at a considerable distance from home ports, and in the great majority of cases it would be impossible to send in the captured boats for adjudication. The expense and annoyance incident to so doing would more than counterbalance the proceeds of the prizes. Such boats would hardly prove important to the enemy in the way of carrying supplies or information. Again, small open boats are most often owned by fishermen who sail them in person, and to whom they represent the only means of getting a livelihood. To carry the owner to a distant country in the capacity of a captured crew, and, after getting his deposition, to turn him adrift with no means of returning home or of supporting himself and his family in case he should make his way back, would be a pitiful thing indeed.

These reasons do not apply to vessels like the *Lola* and the *Paquete Habana*, which are most nearly comparable to the American, British, and French vessels which compose the fishing fleet of the Grand Bank and the coasts of Newfoundland and Labrador. They were staunch, seaworthy vessels, capable of keeping the sea for weeks at a time, and engaged in making voyages of from three to eight hundred miles. They could have been sent in for adjudication to any port of the United States or of Europe. In neither case did the owner of the vessel take part in her active management, but chartered her for a share of her prospective catch; thus she represented an income-producing investment rather than a sole means of enabling the owner to utilize his labor and gain a livelihood.

In the appellant's brief we find passages quoted from the writings of many well-known students of International Law. These advocate the adoption of a rule of war which will give immunity from capture to small boats employed

in fishing along an enemy's coast. All recognize the distinction between coast fishing and deep-water fishing. None of them go so far as to advocate immunity for vessels employed in the latter. Proclamations, orders in council and treaties cited tend to show that the immunity of coast fishermen is generally recognized by the nations of the continent of Europe. It appears, however, that no such doctrine has been adopted by Great Britain, whose policy in war most closely resembles that adopted by the United States.

In the case of the *Young Jacob*, 1 *C. Rob.* 20, Lord Stowell said that the immunity of coast fishermen from capture was a matter of comity or grace, and not one of right. The *Young Jacob*, which was a small fishing vessel, was condemned as prize, but subsequently was released pursuant to an order in council. This order in nowise affected the validity or the propriety of Lord Stowell's decree. It was an act of grace which it was competent for the executive alone to grant. The court was bound to follow the law.

The cases at bar must be adjudicated in accordance with the laws in force during the late war with Spain. No proclamation has ordered the release of the vessels in question or of vessels of their class. The opinions of European writers and executive action, taken in individual cases, do not possess any value as authorities. It was said by Professor Woolsey, in a recent lecture upon international law (Yale L. J., June, 1899:)

> "Others give it the name of law, but refuse to give it that character—in fact, tend to deprive it of all character—by spinning its rules out of their own brains and putting their own ideas of what should be law alongside the rules which have bound States for generations, on terms of perfect equality.

"This sort of animal is apt to be a continental jurist and is profoundly contemned by the man bred under the common law of England and the United States, with a wholesome respect for precedents and judicial decisions. He in turn may serve his mistress badly, if he falls back, hide-bound, upon the lessons of the past, its accepted rules, its unquestioned usages, its century old laws, with never an attempt to better or amend or replace what has been outgrown. Formalist, theorist, critical jurist, each has his value, but to get that value out you must roll the three together and mingle their methods, as you rub your salt, and oil, and vinegar into one smooth resultant.

"Thus, the Austinian critic is wrong, because he does not account for the facts in the case; he does not explain the existence of a body of international rules and usages by which States in their intercourse are, and agree to be governed, but which are far wider and more extensive than the sum of their treaty agreements.

"So is the theorist wrong, because he sets up his wishes and fancies as law and fact. Were his method right, there could be, and probably would be, as many different bodies of International Law as there are jurists."

The blockade of Havana and the northern coast of Cuba had been established pursuant to the President's proclamation of April 22, 1898, and was actual and effective when these vessels were intercepted, both steering for Havana and carrying thither large cargoes of food, a supply which the establishment of the blockade was intended to exclude, and which the maintenance of the blockade was likely to render most necessary to the Spanish garrison and the citizens who remained loyal to Spain. The object of war, and especially naval warfare, being to cripple the enemy's commerce and cut off its supplies, such captures as these are justifiable and proper.

II.

The joint resolution of the Senate and House of Representatives approved April 20th, recognizing the rightful and actual independence af the people of Cuba, did not and could not change the allegiance of any person who elected to remain loyal to Spain, or change the nationality of a vessel whose owner elected to sail her under the Spanish flag.

After a recital of the circumstances and conditions which impelled Congress to act, the resolution provided:

> "First. That the people of the island of Cuba are and of right ought to be free and independent; that it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government of the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. . . .
>
> "Third. That the President of the United States be and he hereby is directed and empowered to use the entire land and naval forces of the United States and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect; that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction and control over the said island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the Government and control of the island to its people."

A foreign power certainly cannot change the allegiance of an individual against his will. It cannot be seriously argued that, by virtue of the resolution, all residents of

the island of Cuba ceased to be loyal subjects of Spain, irrespective of their wish in the matter The right of each citizen to transfer his allegiance was recognized, and also the right of transferring it in the future, but his actual allegiance at any particular time was a matter to be determined by his own choice. His choice could be evidenced only by his conduct.

Although the Cuban insurrection had been in progress for three years, the owners of both of the vessels and their cargoes had retained their residences in Havana, the seat of the Spanish government of the island and the headquarters of its military operations.

It has been held that a long continued retention of residence within territory controlled and governed by a hostile power is conclusive evidence of a person's adherence to the hostile government.

> *The Peterhoff*, 5 *Wall.* 28: "It has been held by this court that persons residing in the rebel States at any time during the Civil War must be considered as enemies during such residence, without regard to their personal sentiments or dispositions."
>
> *Prize Cases*, 2 *Black*, 666, 687.
>
> *Mrs. Alexander's Cotton*, 2 *Wall.* 404.
>
> *The Venice*, 2 *Wall.* 258.

Throughout the Cuban insurrection the *Paquete Habana* and the *Lola* had continued to sail under the Spanish flag and to carry their cargoes, not to ports of neutral states or to ports held by the Cuban insurgents, but to Havana. The conduct of the owners and the admission of both claimants that all concerned were loyal Spanish subjects, proves conclusively that at the time of capture, the vessels and cargoes were Spanish and were subject to capture and condemnation as enemy property.

III.

The prize court would not have been justified in ordering of further proofs, and it would have been error had the prize court so done.

The authorities are uniform in saying that a prize court is not justified in ordering further proof where there is no doubt with regard to the facts, and that such an order should only be made where the ends of justice clearly demand it. The ordering of further proof rests in the sound discretion of the court. In the present case, no issue of fact was or could be raised.

The appellants do not set up rights, but ask charity and forbearance from the United States. We submit that while this might have been extended to them by the executive, a court must administer the law as it exists.

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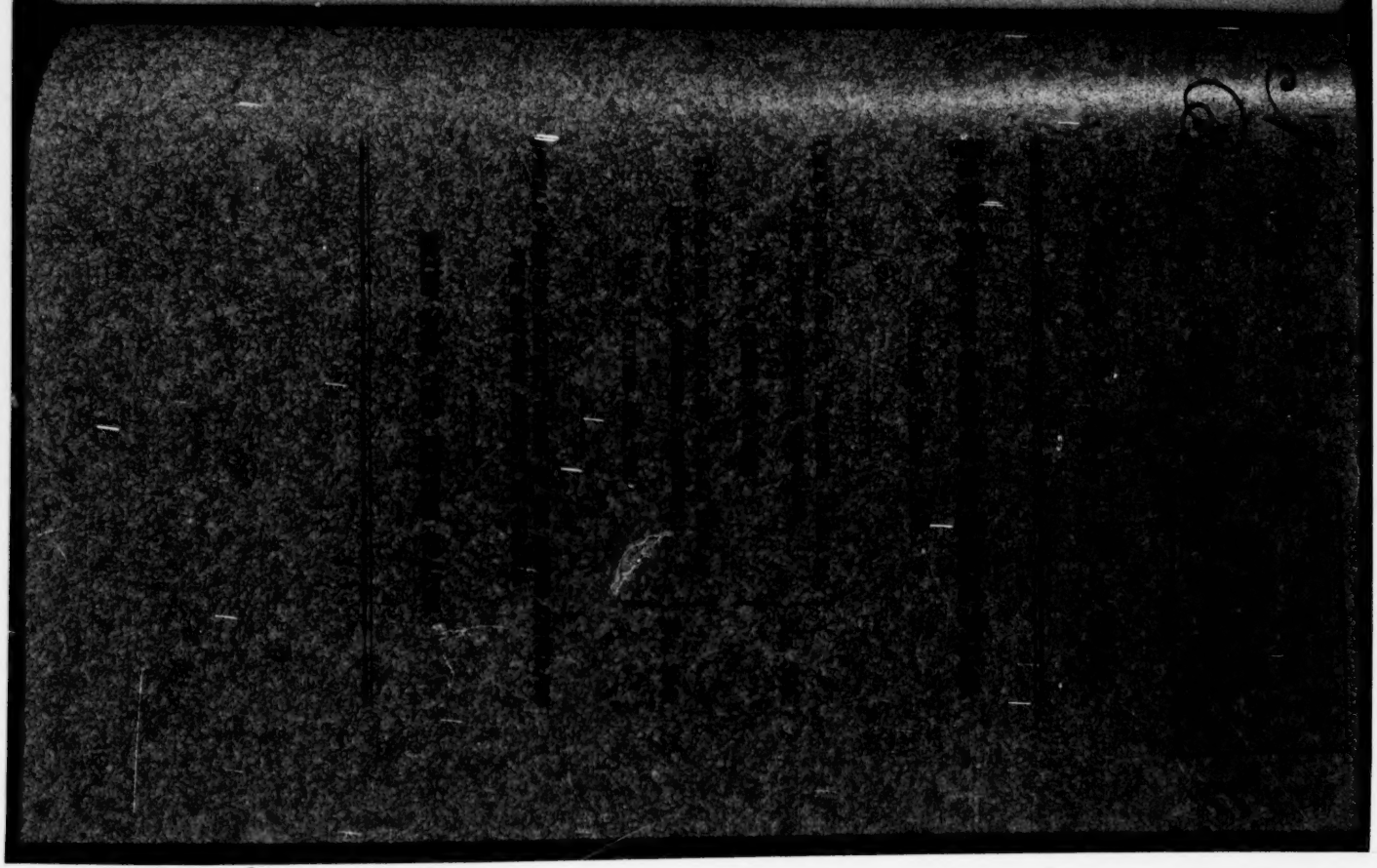
JAMES H. HAYDEN,
Of Counsel for the Captors.



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK PAQUETE HABANA, Juan Pasos, claimant, appellant, *v.* THE UNITED STATES. — No. 395.

THE SPANISH SCHOONER LOLA, TOMAS Betancourt, claimant, appellant, *v.* THE UNITED STATES. — No. 396.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

FACTS.

The brief records in these cases show—

That the *Paquete Habana* was seized by the *Castine* on April 25, 1898, duly libeled, and after the deposition *in preparatorio* of the master was taken, was condemned with

her cargo as enemy property and for an attempt to violate the blockade of Havana. Afterwards, upon motion in behalf of the owners, the decree was vacated and a claim was filed by which it appeared that the vessel belonged to a resident of Havana, who, also, was the owner of one-third of the cargo, the other two-thirds thereof belonging to the claimant as master and the other members of the crew, all of whom were Cubans, who, "prior to the recognition of Cuban independence, were Spanish subjects." This appears also to have been the status of the vessel owner. It appears that the vessel was used exclusively in the coast waters of Cuba for catching small fish; that the seizure was made while they were returning to Havana with the catch from a fishing trip to Cape St. Antonio; that prior to that time they were unaware of the existence of the war or of the blockade; that the vessel had carried no cargo, save fish, and no passengers; that she was of sloop rig with one mast and 25 tons burden.

In the deposition of the master and claimant *in preparatorio* (pp. 9–11) it appeared that he was a Spanish subject, that the vessel sailed under the Spanish flag, and that she was a coasting vessel with a license to fish. The claim was that the vessel was under general law and under the proclamation of the President of April 26, 1898, privileged and exempt from capture and condemnation as a fishing vessel with her catch. Certain depositions of officers of the *Castine* and of the *Newport* appear in the case (pp. 17–20), but these affect only the question of distribution.

The vessel and cargo were sold for $490. After hearing upon the claim set up, the court affirmed and reinstated the previous decree of forfeiture, and thereupon the claimant took this appeal, assigning as error (p. 21) the refusal of the court to hold that fishing vessels in the situation of the *Paquete Habana* at the time of her capture are exempt from capture as prize; and that the vessels and cargoes were property of Cubans, whose freedom and independence had been recognized by Congress, and who were entitled accordingly to the rights, privileges, and immunities of neutrals. Objection was also made to the court's refusal to allow further proof on the grounds for the exemption claimed, but it seems that this is no longer urged.

That the *Lola* was seized on April 27, 1898, by the *Dolphin*; that the libel in prize was filed thereafter; that the deposition of the claimant on behalf of the owners (pp. 9–11) showed that he, a Spanish subject, living in Cuba, was the master appointed by the owner, who lives in Cuba and is a Spanish subject; that he was sailing under the Spanish flag; that the vessel is of about 55 tons burden and carried six mariners, who were all Spanish subjects; that the crew had no interest in the vessel, but had an interest of two-thirds in the cargo, the other third belonging to the vessel owner; that the cargo was live fish caught off the coast of Cuba; that the day before capture he was warned by the *Cincinnati* not to go into Havana, and changed his course for Bahia Honda, where he was told he would be allowed to land. After this evidence was taken the vessel was condemned with her cargo

as enemy's property, and then the decree was opened for the purpose of allowing a claim to be filed, although the claimant had previously appeared and made a claim on the ground that the vessel was a fishing vessel and not liable to capture. Thereupon a formal claim and test affidavit were filed showing the foregoing facts, stating in effect that both the owner and crew were Spanish subjects prior to the recognition of Cuban independence; that prior to their stoppage by the *Cincinnati* they were unaware of the existence of war and the blockade, and setting up similar statements in other respects and the same claim for exemption as in the *Paquete Habana* Case.

It appears that the vessel was of schooner rig, and had two masts.

After hearing upon this claim, the degree of condemnation was reinstated, and thereupon the property was sold for the sum of $800, and the claimant took this appeal, assigning the same grounds of error as in the *Paquete Habana* Case.

It seems that other cases are by agreement between counsel for the Government below and counsel for the claimants dependent upon the determination of the issue in these cases, said other cases being those of the *Fernandito*, of 35 tons burden; *Severito*, of 35 tons burden; *Santiago Apostol*, 78 tons; *Espana*, 80; *Poder de Dios*, 45; *Antonio Suarez*, 40; *Oriente*, 45; *Quatre de Setiembre*, 30; *Antonio y Paco*, 46; *Engracias*, 43. Most of these vessels carried a crew of eight, and others of six or seven, respectively. They all carried cargoes of fish.

THE LAW.

There are two questions in the case, viz: Whether as matter of general law fishing vessels of this class are exempt from seizure, and whether the owners, being Cubans, are entitled to the privileges and immunities of neutrals. That is, the questions regard the *character of the vessels* and the *character of the ownership.*

The claimants were, however, plainly Spanish subjects and bore the Spanish flag. It is not even suggested that they were in sympathy with the insurgents; much less that they were of that party. The principles as to neutrals would not apply in any case, for the insurgents were in fact belligerent allies, and this shows how impossible it is to regard these people taking provisions to Havana either in that character or as neutrals. And in law the insurgents were not recognized; the United States carefully avoided their recognition as belligerents, and the joint resolution of April 20, 1898, was merely a demand on Spain to relinquish sovereignty and a declaration that "the people of the island of Cuba are and of right ought to be free and independent," the truth being with the second rather than with the first half of this proposition.

The claimants were therefore clearly not of that section of the Cuban people who were to be regarded as belligerents with us and allies. What is the status in international law of the Cuban people generally, who, it is declared by the resolution of Congress on April 20, "are and of right ought to be free and independent?" There are few precedents to guide the inquiry. The

people of the North American colonies declared on July 4, 1776, that they were free and independent. Did they so stand in the law of nations until the contest was over and their status had been recognized and accepted? And may such a general declaration of Congress, one part of which certainly was not in strict accordance with the existing fact, terminate violently and abruptly the previous national ties of another people over whom we possessed no rights and exercised no control, especially as to that part of those people who did not desire the relations to Spain to be severed? Among such it is fair to presume and contend (in view of all the circumstances) that the claimants here are to be numbered. And can the argument be advanced as sound that such a general declaration has the force of law in the sense of drawing after it the consequence that the sovereign rights of the United States in the nature of monarchical *jura coronæ* and the vested rights of the naval captors are thereby repealed? We think not, and we respectfully submit that the character, *status*, and relations of these people are such that in international law, for all the purposes of the Spanish war, and, in particular, relative to the rights founded on the law of prize their previous governmental connection should be considered as undisturbed by the language or intent of the resolution of April 20, 1898. We further submit that the fullest light thrown on this inquiry, and the closest and most recent precedents furnished by adjudications of the court are those arising during the civil war, by which it was determined that the *status* of persons

domiciled in the South, not only of those disaffected toward the Federal authority, but of those who were neutral in the struggle, was that of citizens and adherents of the enemy, and such persons suffered various penalties in consequence.

In the case of *Mrs. Alexander's Cotton* (2 Wall., 404) Chief Justice Chase said (p. 419):

> It is said that, though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore can not be regarded as enemy property; but this court can not inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until by the action of the Legislature and the Executive, or otherwise, that relation is thoroughly and permanently changed.

And in the *Prize Cases* (2 Bl., 635), it is said that—

> All persons residing within this territory [the Southern States] whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, * * * Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen (8 Cr., 384). The owner, *pro hac vice*, is an enemy." (3 Wash., C. C. R., 183.)

> The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded is legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory.

"In war, all residents of enemy country are enemies." (*Lamar, ex'r*, v. *Browne*, 92 U. S., 187, 194.) See also *Young* v. *United States* (97 U. S., 39, 60) to the same effect.

In *Ford* v. *Surget* (97 U. S., 594) the court states the following as one of the propositions settled by or plainly to be deduced from its former decisions:

> The district of country declared by the constituted authorities during the late civil war to be in insurrection against the Government of the United States was enemy territory, and all the people residing within such district were, according to public law and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, *without reference to their personal sentiments and dispositions.*

That political status and not individual loyalty or disloyalty is controlling on the question of enemy ownership is well settled by the cases of *The Amy Warwick* (Fed. Cas., No. 342); *The Hiawatha* (id., No. 6451); *The Peterhoff* (id., No. 11024); *The Sally Magee* (id., 12260).

The furthest concession made by the court from the doctrine that residence in the enemy territory makes an

enemy subject or citizen is shown by the following quotation from the syllabus in the *Peterhoff* case (5 Wall., 28):

> Citizens of the United States *faithful to the Union* who resided in the rebel States at any time during the civil war, but who during it *escaped from those States* and have subsequently resided in the loyal States or in neutral countries, lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.

Nor is anything to be found in the Executive proclamation of April 26, 1898, which specifically affects these vessels. The only language which may be considered at all applicable to them being the language of the second paragraph of the preamble, in which it is stated that it is desirable that the war "should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." This language, of course, refers particularly and perhaps exclusively to the more enlightened modern practice regarding the subjects of the articles which follow, viz, the provisions of the Declaration of Paris and the exemptions to certain Spanish merchant vessels entering or issuing from our ports.

Therefore the inquiry is as to the general rules of prize law regarding such fishing vessels. Webster defines a fishing "smack" as "a small vessel commonly rigged as a sloop, used chiefly in the coasting and fishing trade." But the exemption extended to fishing vessels in foreign prize practice, chiefly because of the insignificance of such property, or on account of humanitarian considerations, is understood to apply rather to

small open boats of the dory, dingey, or yawl class, for propelling which oars as well as sails are used, although a mast and sail are auxiliary and are employed to carry vessels to fishing grounds, where they are unstepped and furled.

It seems that even in deep-sea fishing, as for mackerel or herring off the Scottish coast, the boats are called skiffs ("herring skiffs"), although they are comparatively large and powerful boats and will stand a heavy sea. Nevertheless, even for this type of fishing in boats which go well offshore, they seem to be open and not decked, and to depend largely on their oars. (*Vide* Wm. Black's story of "The Four MacNicols," pp. 94, 95, 98, 110; Harper & Brothers: New York, 1882.)

These boats were sloops and schooners, and in the one case (*Paquete Habana*, record, p. 14) had been on a fishing expedition to Cape San Antonio, about 200 miles to the southwest of Havana, and in the other (*Lola*, record, p. 13) the boat had been to points near the coast of Yucatan, eight days distant. This is the type of boats engaged at fisheries, which, it is well known, as shown in other more recent fiction, proceed from England, France, Canada, and the United States to the fishing banks off Newfoundland, remaining there for months. Would it be contended that the sloops and schooners engaged in such fishing and the foreign rigged boats of similar type were the sort of fishing vessels exempt from seizure under the prize practice and usage of earlier times?

It is obvious that where two nations at war are contiguous, as in the case of England and France, the

presence of such small boats will be a frequent and customary fact in naval operations of the war, and the insignificance of the property and the special injustice to people in a small and hard way of living, and the equal inconvenience to both parties, would dictate the exemption of such boats and their cargoes of fish; and when the operations of the war were on more distant coasts and directed against a remote enemy, as in the operations during the Crimean war on the Russian Baltic coast, another reason would intervene, for it would not be worth while to carry such trifling prizes to a home port for adjudication. It is also understood that the rule of continental Europe is to regard the foregoing practice as tolerably well fixed into a rule of prize law; while, on the other hand, the English rule is to consider the question as discretionary with the executive and as requiring an express ordinance of exemption. Our own law has always followed the English determinations upon prize law, as in other branches of jurisprudence, rather than those of countries of continental Europe under the different system of the civil law. It therefore appears that to exempt fishing vessels of any class there should be some treaty obligation which requires it, or some specific ordinance or proclamation by which the executive shows an exercise of discretion in favor of the property claimed to be exempted. In this case no such title to exemption appears; on the contrary, the discretion lodged in the Executive has been exercised, and, we contend, under the circumstances, soundly exercised, by the commanders of the capturing vessels, against the contention of the claimants.

Furthermore, returning to the character of these vessels, they all appear of sufficient tonnage to take them out of the class of such small fishing vessels as ought to be and are exempted. They were sloop or schooner rigged. It is understood that many, if not all of them, were engaged in Spanish trade under the Spanish customs and navigation laws as Cuban coasting vessels and held a license to fish. That is to say, they were Spanish coasting vessels which pursued fishing as their avocation, under a license, when not engaged in the coasting trade. It is understood that it is common information in those waters and about our contiguous shores that this fact is ordinarily true of vessels of this character on the Cuban coast. We therefore contend that while it may have been true that fishing boats were regarded by prize law as too trivial for capture in old times when fisheries were carried on in small open boats, in more recent times, and since large vessels have been employed for that purpose, the reasons for the rule have disappeared, and in addition the rule itself was never fully accepted in England, but the subject was left to the discretion of the Crown.

In *The Young Jacob and Johanna* (1 Rob., 20), which was the case of a small Dutch fishing vessel taken April, 1798, Sir William Scott said:

> In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In

> the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade.

The French ordinance of the year 1543 gave the admiral a power of forming fishing truces with the enemy during hostilities, or of granting passports to individuals to continue their fishing trade unmolested. This practice prevailed so late as the time of Louis XIV. They have since fallen into disuse, "owing to the ill faith with which they were observed by the enemies of France." (Valin, liv. 5, tit. 1.) The indulgence was renewed again between the two countries in the war before the Napoleonic wars. Arret du Conseil du Roi, 6 November, 1780. (Note, p. 21, *The Young Jacob and Johanna*, *supra*.)

The Noydt Gedacht (2 Rob., p. 138, note) was the case of a small Dutch fishing vessel seized and condemned, with her cargo, as enemy property. *The Johan* (Edw., 275) was a Hamburg vessel which had sailed from that port on a fishing voyage, and was captured on her return. The vessel was restored on the ground that she had sailed from Hamburg before the issuance of the order of council prohibiting such a voyage. And in the case of the *Liesbet Van Den Toll* (5 Rob., 283) the vessel, which was occupied in the fishing trade of Holland, was restored for reasons affecting the national character of the owner.

THE BASIS OF THE LAW OF NATIONS AS AFFECTING THIS QUESTION.

A. On the character of the vessels.

International law is largely to be collected from the practice of different nations and the authority of writers, as was held by Lord Mansfield in a case in which ambassadorial privileges were concerned, cited in *Queen* v. *Keyn* (2 Exch. Div., 63, 68, 70). In this inquiry we are engaged in investigating the practice of nations, and are scrutinizing the authority of writers. These are the very points at issue.

Froissart's Chronicles, referring to very early times, says that in the English and French wars fishers were not evil entreated by either party, but were treated by both as friends, because they aided each in need. It may be said again that the early exemption was applied to the rude, small, open boats of that time, fishing near their respective coasts; was granted originally as an express exemption by royal grace on each occasion, and came within that part of the broad rule of humanity which concedes certain privileges to people who work with their hands in respect to the tools of their trade or occupation. So the British King's proclamation of October 5, 1406, established and decreed that under the royal protection, safe conduct, charge, and care the fishermen of France, Flanders, and Brittany may "freely and lawfully sail about and travel back and forth, and may fish * * * through and within our domain, limits, and territory." But this does not refer to any state of war

at that particular time, and must be construed in reference to the English claim throughout that age of sovereign title to France.

The *Young Jacob* case, *supra*, shows that it was merely not "usual to make captures of those *small fishing vessels*;" that the rule of exemption was a rule of comity only and not of legal decision, and had prevailed from rules of mutual accommodation between neighboring countries, and from tenderness towards a poor and industrious people. Now, we contend that the rule referred to very small vessels, open boats, fishing close along the coasts; that the exemption proceeded from an express allowance of royal grace; that, while on the Continent, and especially in France, this exemption so derived grew into a tolerably well-fixed rule, even in France the danger of imposition appeared and weakened the rule, because larger boats conveying intelligence to the enemy sought to pass under it, as is shown in the case cited in the note to the *Young Jacob* report, 1 Rob., p. 21; that in England the rule never passed beyond the discretion of the executive, and was always allowed specifically. In 1806 an exemption was allowed by England to "fishing vessels * * * engaged for the purpose of catching fish and conveying them fresh to market;" but it would seem to have been open to the same objection as that shown in the *Young Jacob* to attach to the exemptions granted by France, namely, that it was made use of to aid the enemy; for it is to be particularly observed that it does not seem to have been allowed since in England. There is no grant of any such exemption in the Crimean war. Therefore, in considering the subject, especially as viewed by

the appellants' brief, it must be remembered that the writers on international law—and especially the Continental writers on international law—are far in advance of legislation, as well as of decisions of the courts; that while the English law writers are more sober in their statements, and have greater regard for the rights of belligerents, even they do not express the English law as it is, but rather as they conceive it ought to be; and that in looking to any foreign rule for our guidance we properly regard, where our own practice and law are silent on the question, the decisions of the English courts, and not the speculations of writers on international law, either English or Continental.

The work of De Boeck, "De la Propriété Privée Ennemie sous Pavillon Ennemi," Paris, 1882, contains on pages 217–224, inclusive, a full statement of the history, learning, and authorities on the exemption of fishing vessels. It is there shown that the exemption is an ancient usage, applying to enemy boats engaged in coast fishing. The motive of a humane concession to poor people is noted, and among notes which cite the authorities the immunity is said to extend to the persons, boats, provisions, nets, and other apparatus and to the cargo of fish. The French origin of the exemption is referred to, and it is shown, as we contend, that at the beginning, under the old ordinances, there was an express direction to the admiral to grant the exemption; and it is noted that later, under Louis XIV, the enemy's fishing boats were not respected because of the alleged breach of faith on the part of the English in seizing French fishing boats, which obliged

the French King to disregard the treaties, which otherwise would have been disadvantageous to the French. It is also shown that the French ordinance of October 1, 1692, was regarded as merely a safe-conduct to enemy fishing vessels for eight days. The right is spoken of as a "French tradition," which was interrupted for more than a century and was reestablished by Louis XVI in the war for American independence, and extended to all such vessels as were not defensively armed and had not been convicted of giving signals or intelligence to enemy vessels of war, this renewal of the exemption being continued through the wars of the French revolution, "but not without some intermittence," the facts of which are given. The affirmance of the rule in the Crimean war by France, in the Italian war, and the Franco-Prussian war, are also stated, as well as the fact that the United States followed the practice in the Mexican war, Ortolan and Calvo being cited as authorities for this statement, although no formal record of an exemption can be found in our public record of the Mexican war. The fact is expressly stated that the British cruisers in the Crimean war seized the boats, nets, fishing implements, and provisions of the offshore fishers in the Sea of Azof. De Boeck then asks the question: "But is there in this custom of exemption so much of fixity and generality as to erect it into a positive rule and formula of international law?" He says that Heffter, Bluntschli, Calvo, and Massé admit the positive rule without hesitation; Bluntschli, however, stating that only those fishers are exempted who are ob-

viously in condition for the exercise of their calling, and attention is called to the fact that Mr. Hall has noted the danger which exists that fishing boats and their equipment may be employed for the benefit of the enemy's military operations. It appears to be conceded that while there is such a custom which does or ought to consecrate the immunity, there is no imperative character about it, and the passage concludes with the exception that while the coast fisheries should be protected, the immunity should not be extended in favor of deep-sea fishing, the reason for the immunity ceasing in that case as in the case of fishing boats employed in the enemy ervice.

Mr. Hall's passage on this subject (W. E. Hall, Treatise on International Law, 4th ed.) shows well the much more cautious views of the English writers, as well as of English decisions. He considers the subject on pages 467–470, and says that "the doctrine of the immunity of fishing boats is mainly founded upon the practice with respect to them with which France has become identified, *but which she has by no means invariably observed.*" On the other hand, "the English Government in 1800 distinctly stated that in this view the liberty of fishing was a relaxation of strict right made in the interests of humanity and revocable at any moment for sufficient reasons of war," the attitude of the French Government being less clear, Napoleon's complaints of the English seizures being valueless as an expression of a settled French policy, and his statements being "utterances of generous sentiment with which he was not unaccustomed to clothe bad faith."

> In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to itself. * * * But it must at the same time be recognized that fishing boats are sometimes of great military use. * * * Any immunity which is extended * * * must be subject to the condition that [the objects thereof] shall not be suddenly converted into noxious objects at the convenience of the belligerent; and it is not probable that states can consent to forego the advantages which they may derive from the use of their fishing vessels in contingencies which can not always be foreseen. It has never been contended, except by the French at the beginning of the present century, that vessels engaged in deep-sea fishing are exempt from capture (id., pp. 468, 469).

The degree to which the doctrine is settled in the view of the continental writers is briefly referred to by Mr. Hall in note 2, page 469.

Reference has been made in the brief to the fact that the writers on international law, and especially the continental writers, are far in advance of the law as determined by legislation or decisions, or by the plain consensus of agreement on the part of the nations, and that they indulge in speculations which are not justified. We are contending that the court will regard principles fairly settled, but will not be influenced by hypothetical views or considerations of what the law ought to be or may be in the future rather than what it is. The more

sober view of the English writers is well illustrated by the following passages from the preface to Mr. Hall's book (pp. viii–ix):

> But looking to the future, it must be granted that some doubt as to the strength of international law is not wholly unreasonable. Two different sets of indications point in opposite directions. In no previous period have endeavors been made, such as those which have been made during the present generation by the greater European States, to conclude agreements which should not merely express the momentary convenience * * * of the contracting powers, but should embody principles capable of wider and of impartial application. * * * But agreements suggesting rules of action, such as that with respect to occupation on the African coast, and agreements prescribing general rules of conduct, such as the Convention of Geneva, are almost wholly new. * * * They [professors of international law and writers thereon] have done a good deal towards rendering doctrine harmonious and consistent. * * * On the other hand, it is not to be denied that there is a widespread distrust of the reality of this progress. Many soldiers and sailors, many men concerned with affairs, have little belief that much of what has been added in late years to international law will bear any serious strain. And, however convenient a standard of reference that law may be to the settlement of minor disputes; however willing statesmen may be to defer to it when they are anxious not to quarrel, grave doubt is felt whether even old and established dictates will be obeyed when the highest interests of nations are in play. This feeling, for reasons which can not be dismissed as unfounded, is probably

stronger in England than elsewhere; but it is not confined to England.

In addition it is to be noted that the quotation or citation in the brief on behalf of the captors, filed in this cause, refers to a passage from a recent article by Mr. Theodore S. Woolsey, in which the authority of the speculative continental writers on international law is strikingly denied.

In the opinion of the case of *La Nostra Segnora de la Piedad y Animas*, captured in 1801 by a French privateer and ordered to be restored, reported as cited on the appellants' brief, page 14, and also in Pistoye et Duverdy I, 331, it is conceded that by the primitive international law the vessel would have been subject to the right of maritime capture, but was freed from it by a sort of tacit convention between all the European nations. The conclusion of the court restoring the vessel was based upon a royal ordinance of Louis XIV, where the absolute neutrality of the fisheries was recognized. Now, it appears by that very ordinance that English fishermen were forbidden the shores of France, although those who were there were accorded safe conduct for eight days to return home. The opinion goes on to show that France subsequently did not deviate from those principles, and in 1779 the King again expressed the definite royal grace, moved by the class of his own subjects who had for their subsistence only the resources of the fishing trade and as an example to his enemies of his sentiments of humanity; and thereupon gave an express order not to molest English fishermen or arrest their vessels with their cargoes of fresh

fish even if the fish had not been caught from those vessels, provided they were not offensively armed and had not given any suspicious signals to enemy's vessels of war. Here was an express grant of exemption as late as the end of the last century, and the restoration in the case above cited was based upon it. The opinion shows that the French were scrupulous to set an example to the British because "the British ministry brusquely and under vain pretext broke the convention relative to the reciprocal neutrality of fishermen, and sacrificed some unfortunate families to the alarm which the maritime confederation of the north caused."

The decision extended to the Portuguese vessel as a signal favor the same exemption which they had granted toward the English, of whom the Portuguese were allies. It appears, too, that the Portuguese vessel went out solely for fishing, and was occupied solely in this work all the time she was at sea and did not leave Portuguese waters; that she had sailed from a Portuguese port, and was taken only 3 leagues out at sea, opposite another Portuguese port.

The appellants cite various modern writers on international law or "European international law," to which generally we have adverted *supra*. The proper basis of the exemption is shown in the phrase "vessels and implements of coast fishermen" (brief, p. 23), and the fullest extent even of the continental rule is shown in the following statement from Perel's International Public Law of the Sea, 1882, p. 216: "The exemption of the fishing trade from the law of prize in modern positive

international law *may be considered* as well established *through well-founded custom.*"

In 1870 again there was an express order from the Emperor of the French to his officers to permit coast fishing even on the enemy's shores, unless they involve some "abuse which may prejudice military and maritime operations." (Appellants' brief, p. 29.)

The sections quoted from Calvo's International Law (brief, pp. 30–32) show that England never went so far as France in regarding the exemption of fishing vessels as a fixed and acknowledged rule, and, in revoking the ordinance by which they were seized, declared that as to herself "the freedom of the fisheries was an act of pure toleration, which could not be applied to the 'great fisheries' nor to the oyster trade." And even Calvo states that the privilege of exemption is only to fishing boats plying their industry in proximity to shore and is in no country extended to vessels who pursue on the high seas what is called the great fishery, such as that for the cod, cachalot, or the whale. "These vessels are, in effect, considered as engaged in both commercial and industrial operations."

The fact as to exemption by our own Government during the Mexican war appears to be stated in the law writers, but as we have said does not appear of record, and in this country there does not seem to have been any express exemption or any instructions from which such an exemption may rightly be inferred.

Finally, we point out the distinction again between vessels properly exempt as fishing vessels, even if the

United States may rightly be regarded as acquiescing in the foreign continental rule and those which are not so exempt. Vessels exempt are the small and rude open boats of fishers plying their trade near the coast; they are not the decked and sloop or schooner rigged vessels which we have here. It is the understanding of the Government, also, that while these vessels, perhaps all of them, were so constructed that sea water should circulate through them freely, in which the fish were kept alive, they were all plainly capable of carrying freight, and that when not engaged in fishing they did a coasting business. This is shown in the case of the *Paquete Habana*, although not by the testimony in the other cases. The vessels here proceeded in one case about two hundred miles to the neighborhood of Cape Antonio, and were off the Cuban coast, how far it does not appear. The other vessel had been across the high seas to fishing banks off Yucatan, eight days distant. All these vessels were manned by crews of from six to eight men, with a master. They were not owned by the master and others who navigated them; they were not like the tools of trade upon the principle as to which the small fishing vessels under the old rule were largely exempted. The interest of the crew in these vessels and their cargoes was confined to two-thirds of the cargo of fresh fish. The vessels and the rest of the cargoes were owned by claimants, presumably very well to do, who may have owned several fishing boats or a fleet of them; they may very well have been, allowing for the different conditions in Cuba, of the capitalist class. The vessels were, as appears by the record, vessels engaged in the Spanish-Cuban coasting trade and

merely possessing a license to fish, and inasmuch as there is no evidence showing that the owners were of the Cuban rather than of the Spanish party, no good reason can be given on any other ground than the character of the vessels for their exemption. Indeed, the residence of the claimants in or near Havana, the very center or headquarters of the Spanish Government, shows the contrary very clearly. They were apparently willing subjects and cordial adherents.

These vessels are just such vessels as yearly proceed from Gloucester, Mass., Halifax, Nova Scotia, and the Brittany coast of France to the Newfoundland fishing banks, where they remain for months engaged in deep-sea fishing. This is common knowledge and does not require a citation of recent fiction to show the character of the vessels, the size of the crews, and the nature of the fisheries and of the perils undergone. Will it be contended that these fishing vessels would not be valid prize, and that they could safely remain on the grand banks in case of war between their respective countries?

B. As to the character of the ownership and the status of the Cuban people.

The cases cited by the appellants (pp. 38–40) show one thing very clearly—that the recognition of the belligerency or independence of a people is a political and not a judicial question. Chief Justice Marshall, in the *Divina Pastora Case* (4 Wheat., 52), announces the underlying principle, viz, "that the Government of the United States, having recognized the existence of a civil war

between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes and which new governments in South America may direct against their enemy;" and the decision was that, the United States having recognized belligerency, captures by cruisers of the belligerent governments were to be regarded as other captures *jure belli* are to be regarded, and the captured property could not be adjudicated in our courts, but must be restored to the possession of the captors. Thus the recognition of the belligerency on the one hand, which was definitely shown, and the remaining neutral on the other, were necessary parts of those decisions. No question as to the status of individual belligerents as to us arose, and necessarily could not arise as it arises here, because (1) we carefully avoided recognizing Cuban belligerency and finally recognized, by a somewhat ambiguous clause of the resolution of Congress, the *propriety* of their independence; (2) we did not remain neutral, but immediately embarked in a war with Spain; (3) these facts surely give us no right to determine the allegiance of subjects of Spain in Cuba, many of whom certainly desired to retain their allegiance to the Spanish Crown; (4) to illustrate this it may be added that a nation may assert its own independence, as we did in 1776, and then fight for the assertion and win on the issue of war presented; or a nation may assert the independence of another nation which is oppressed, as in the case of Cuba, and fight as we did against Spain, and thereby achieve the independence of that portion of

the previous subjects of the enemy *who desired to be independent*. But the nation who thus champions the cause of the oppressed can not compel the assent of those who do not think they are oppressed, nor violently change their relation and status in international law, under such circumstances as are presented here, from the character of an enemy subject into that of a belligerent ally. That is to say, we contend that the status of the Cuban people is a political question not committed to the decision of the courts as shown by the judgments of the Supreme Court of the United States; and that the political question was determined by the resolution of Congress in the light of what preceded that resolution in no such way and sense that subjects of Spain were turned into friends of the United States who are entitled to have their property seized as prize restored to them because of the language of the resolution.

To bring this out, let us consider for a moment the case of the *Three Friends* (166 U. S., 1, 56), in which the court was considering the language of the neutrality acts, and held that "if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term [a State], then the words 'colony, district, or people,' instead of being limited to a political community, which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country in the effort to achieve independence, although recognition of belligerency has not been accorded." The decision

turned on the point that although belligerency had not been recognized in the Cuban case, the struggling insurgents were nevertheless embraced by the word "people."

This shows again the different application of all these principles to the peculiar facts of this case. The belligerency of the Cubans was never recognized unless by the resolution of April 20; that resolution did recognize their independence by stating that the Cubans were and ought to be free and independent, a somewhat inconsistent statement as applied to another people who might not be willing to fight for their independence as a people, in contrast with our own willingness to fight for our own independence under the similar language of the Declaration of Independence; did such a recognition of independence under these circumstances make the Cuban people a State? There is not yet a Cuban State in the list of nations, and we are still necessarily carrying on the government of that island by a military administration.

The argument against the claimants' position as to the status of the Cuban people may also be presented in another twofold aspect: First, the resolution of Congress only dealt with the *political* rights of the people, and did not attempt at all to legislate with respect to their private rights and private property, or to settle any such rights as those of prize, either against them or in their favor; second, the question raised is a *political* question and not a judicial question, and therefore the only relief claimants could have, if they have any at all, would have been by application to the executive branch of the Government by a petition. In support of the latter contention we cite especially the decision of the English high

court of chancery in the case of *Barclay* v. *Russell* (3 Ves., Jr., 424), which, it appears to us, completely disposes of the question. This decision is one of peculiar authority in this country, from the fact that the Supreme Court of the United States, in the case of *Rhode Island* v. *Massachusetts* (12 Pet., 657), cites it with approval and uses it as an illustration of the difference between a political question and a judicial question with respect to cases of *reprisal* and *confiscation*. The following quotation is taken from the report of that case (p. 738):

> It has never been contended that prize courts of admiralty jurisdiction, or questions before them, are not strictly judicial; they decide on the questions of war and peace, the law of nations, treaties, and the municipal laws of the capturing nation, by which alone they are constituted, *a fortiori*, if such courts were constituted by a solemn treaty between the State under whose authority the capture was made, and the State whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their subjects, and hold their final decrees conclusive on rights of property. (6 Cr., 284, 285.)
>
> These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or State exerts by his or its own authority, as *reprisal* and *confiscation* (3 Ves., 429); the latter is that which is granted to a court or judicial tribunal. So of controversies between States; they are in their nature political, when the sovereign or State reserves to itself the right of deciding on it; makes it the "subject of a treaty, to be settled as between States independent," or "the foundation of representations from State to State." This is political equity, to be adjudged by

> the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the *equum et bonum* of the case, let who or what be the parties before them. These are the definitions of law as made in the great Maryland case of *Barclay* v. *Russell* (3 Ves., 535), as they have long been settled and established. Their correctness will be tested by a reference to the question of original boundary, as it ever has been and yet is by the constitution of England, which was ours before the Revolution, while colonies (8 Wheat., 588), as it was here from 1771 to 1781, thence to 1788 and since by the Constitution as expounded by this court.

Whatever might have been the case as to the right of Cuban vessels, flying a Cuban maritime flag and operating against Spanish vessels, to make prizes under the decision in the case of the *Ambrose Light* (25 Fed. Rep., 408), as matter of fact there were no such Cuban vessels. The appellants refer to the fact that these vessels necessarily bore the Spanish flag (brief, p. 50); that no Cuban maritime flag then existed, nor has a Cuban flag actually been recognized by our Government up to the present; that Cuban vessels now use the American flag. These facts are true. From this the appellants draw the conclusion, referring to the case of *La Palme* (Wheat. Int. Law, 2d Eng. ed., sec. 340a, reported in Recueil General des Lois et des Arrets.— Sirey, De Villeneuve, et Carette, 1873, II, 237), that all the fishing smacks should be restored. The distinction is an obvious one. In the *Palme* case, a German-built vessel, belonging to a Swiss corporation, but flying the German flag, was seized as prize during the Franco-Prussian war by a French

cruiser. It appeared that Switzerland, not being a maritime nation, had no maritime flag, and that the Swiss federal council did not permit vessels belonging to Swiss subjects to fly the federal flag, and that France had, in 1854, refused to acknowledge any Swiss maritime flag. Therefore the German flag was borne, and the decision very properly restored the vessel under these circumstances. Switzerland, however, was a nation and a neutral nation. There was no Cuban nation in this case, and these Cubans were Spanish subjects, and, as we claim, are fairly to be regarded as cordial and willing Spanish subjects. Spain has had and has a maritime flag, and these vessels bore it. The *Palme* Case has no applicability to the present one. The report in that case shows the following very special reasons why the vessel was ordered to be restored, viz:

> Because of the exceptional circumstances, and in consideration of the services rendered by Switzerland to a French army during the war, it is proper to yield, in the case of the Society of Protestant Missions of Bâle, the right which belongs to the French Government of declaring to be good prize every vessel sailing under the enemy's flag: Art. I. The decision appealed from is reversed. Art. II. The security (or bond) that has been given is ordered discharged, and the sums which may have been deposited thereunder will be restored.

The entire reasoning of the appellants is based upon the fact that these are "neutral ships," setting out before the war and without any opportunity on the part of the owners to take them back under their own flag, or, in this case, by any other ways to declare and vindicate their

neutrality. But we repeat our contention that these vessels were not neutral ships; they were enemy ships.

In the course of argument, though not in this case, counsel for claimants of one of the vessels referred to Lord Byron's cynical and scornful view of prize money, which is associated with revenge, as a proscribed and contemptible thing. Lord Byron, particularly when he wrote those lines early in his life, is not a fortunate authority on a question where either a high or low motive for a human action might be assumed. By instinct he chose the lower one, because he was by nature a scoffer. There have been times, and in periods comparatively modern, when the reproach of selfish and unworthy motive might be imposed upon privateers. Certainly no one can fairly imagine that the record of this war shows the naval officers of the United States to have been acting under any other motive than a high sense of their duty and a strict sense of their honor. In the motives for action and in the slender worldly rewards for the service rendered both in the military and naval branch of the Government, thoughtful men have long seen a public service which was more completely altruistic and less tainted by lower and personal motives than almost any other work in which men embark. However devoid of self-sacrifice war in its objects may be, it is the nation and not the individual which declines to recognize the higher motive, because of the necessity of national self-preservation; the individual fully recognizes the motive of self-sacrifice, and the result as to him vindicates the motive. Therefore the imputation upon the reasons

for these seizures is highly unjust to the Navy. The record of releases by Executive action, and often because of the Navy view of the circumstances, is not before the court. The Government is fully convinced that the cases which have now been heard on appeal are cases of good and valid prize, and the officers of the Navy, if they had not brought the vessels in for adjudication, would clearly have been derelict to their duty.

Something has also been said as to the abolition of prize money and the repeal of the statutes allowing it by the act of March 3, 1899 (30 Stat., 1007). This only refers to the allowance to the officers and men of the Navy. Prize is a sovereign right of the United States, which, like this and other *jura coronæ* in England, still remains and will continue to be asserted in case of future wars, until the historical attitude and uniform desire of the United States that private property of the enemy on sea as well as on land should be exempt from capture has been incorporated into the law of nations by international agreement.

The United States therefore respectfully submits that the decree of condemnation of these vessels and their cargoes in the court below should be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PASOS, CLAIMANT, APPELLANT, v. THE UNITED STATES. — No. 395.

THE SPANISH SCHOONER "LOLA," TOMAS BETANCOURT, CLAIMANT, APPELLANT, v. THE UNITED STATES. — No. 396.

THE FISHING SMACK CASES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION.

This question was raised by the court on the oral argument, and leave granted to file briefs. The question had

escaped the attention of counsel, apparently on both sides, in the court below as well as here. It arises as follows:

Section 695 of the Revised Statutes provides:

> An appeal shall be allowed to the Supreme Court from all final decrees of any district court in prize causes where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed without reference to the matter in dispute on the certificate of the district judge that the adjudication involves a question of general importance; and the Supreme Court shall receive, hear, and determine such appeals, and shall always be open for the entry thereof.

Although it has been determined that prize jurisdiction is involved in the general delegation of admiralty and maritime powers as expressed in the language of the ninth section of the judiciary act (1 Stat., 76), and although admiralty and maritime causes, where the matter in dispute, exclusive of costs, exceeded the sum or value of $300, might, under the judiciary act, be removed by appeal from the district courts to the circuit courts, and then could be transferred from the circuit courts to the Supreme Court by a writ of error (secs. 21, 22, judiciary act; 1 Stat., pp. 83, 84), nevertheless, subsequently provision was made for appeals from the circuit courts to the Supreme Court in cases of prize or no prize, among others where the matter in dispute, exclusive of costs, exceeds the value of $2,000. (Act of March 3, 1803, sec. 2; 2 Stat., p. 244; *The Admiral*, 3 Wall., 603, 612.) See also section 692, Revised Statutes, as to which it will be noted that the phrase "and of prize or no prize,"

appearing in the original act of 1803, has been omitted, doubtless because of the subsequent express provision that prize appeals shall go direct from the district courts to the Supreme Court. And by the act of June 30, 1864, section 13 (13 Stat., 310), such direct appeal was given with the same limitation appearing in the equivalent section of the Revised Statutes (sec. 695), the language of the act of 1864 being: "Such appeals may be claimed whenever the amount in controversy exceeds two thousand dollars, and in other cases on the certificate of the district judge that the adjudication involves a question of general importance." Section 13 of the act of 1864 also provides as to any prize causes then pending in the circuit courts that they "shall, on the application of all parties in interest who have appeared in the cause, be transferred by that court to the Supreme Court, and such transfer may be made in the discretion of the court and on such terms as it may direct, on the application of any party; provided, that if the amount in controversy does not exceed two thousand dollars such transfer shall not be made unless the court shall certify that the adjudication involves a question of general importance."

This provision has, of course, disappeared from the Revised Statutes, because the appeal from the court of first instance is now direct to the Supreme Court. *The Alicia* (7 Wall., 571) considers the subject relative to a case then remaining in the circuit court.

The case of *The Admiral* (3 Wall., 603, 612) was appealed from the district court to the circuit court while the provision reducing the minimum value required for such appeals to the sum of $50, exclusive of costs, was

as applicable to prize causes as it then still was to all the other matters of jurisdiction embraced by the second section of the act of March 3, 1803. Reference is made to the case cited, and the authorities therein referred to for further light on the subject.

It seems that a decree of condemnation or of restitution in the court below is a final decree, because nothing is left to be litigated between the parties, even if all matters arising upon the libel and all the claims have not been finally disposed of (*Withenbury* v. *United States*, 5 Wall., 819). For instance, the question of distribution in case of condemnation always remains, but does not affect the finality of the decree below. (See section 4637, Revised Statutes.) Section 1009, Revised Statutes, provides that the Supreme Court may, "if in its judgment the purposes of justice require it, allow any appeal in a prize cause;" but this obviously refers to cases where appeals have not been perfected within the time limit of thirty days after the rendering of the decree appealed from, but where notice of appeal or of intention to appeal has been filed with the clerk of the district court within that period.

Upon the foregoing it is evident that an appeal to this court where the sum or value of the property does not amount to $2,000 is not well taken, unless the district judge certifies that the adjudication involves a question of general importance. There is no such certificate in these cases.

Is the question, however, affected by the provisions of the circuit court of appeals act? That act (1 Supp. Rev. Stat., 903) provides by section 5, "that appeals or writs of

error may be taken from the district court or from the existing circuit courts direct to the Supreme Court in the following cases: * * * from the final sentences and decrees in prize causes." * * *

The circuit court of appeals act does not therefore seem to affect the question of limitation, unless it should be considered that the following paragraph of section 5, being the one next to the last, is involved:

> In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.

But we think it is obvious from all the provisions of section 5 that the reference to finality only embraces those cases which are not made final in the *circuit court of appeals*, and does not refer to cases not final in the district or circuit courts under earlier creations of jurisdiction, including prize causes. We are unable to find any authority to show that the effect of a restatement of jurisdiction by the circuit court of appeals act, such as that in reference to prize causes, containing no express repeal of any preexistent limitation of jurisdictional amount, operates to work a repeal by implication. This is contrary to a well-established rule, and we therefore respectfully submit that an appeal in a prize cause not conforming to the limitation and condition shown by section 695 is not well taken.

Under the peculiar circumstances of these cases it seems proper to submit the question to the court without further argument.

Reference was also made in the oral argument to the fact that the circumstances justified the belief that the claimants in these cases were well to do and presented no humanitarian claim to exemption which ordinary fisher folk, working as well as owning their boats, would present; and it was stated that the two records before the court did not disclose whether claimants in any one case were interested also in other cases. It is, however, the fact, and is shown by the records in the other cases below, that Francisco Gonzales—the owner in the *Lola* Case is named Gonzales, but not Francisco (Rec., pp. 12, 13)—is part owner of the *Poder de Dios*, and also of the *Engracias;* and that Villar & Co. are sole owners of the *Antonio Suarez* and part owners of the *Antonio y Paco.* We do not contend that well-to-do people, the owners of fishing vessels, who were active Cuban sympathizers would not be entitled to an exemption, otherwise properly founded, without reference to the amount of their possessions; but we do say that this circumstance and the facts that they were residents at Havana, the seat of the Spanish Government, and that their vessels were bringing supplies to that place, have, in their combined effect, an important bearing on the question, as showing that they clearly belonged to the dominant Spanish population and not to the insurgent party. This, we say, fairly affects the question of further proof. The temptation to say now that they were at all times sympathizers with and aiders of the insurgent cause, and that they were awaiting an opportunity to leave the hostile territory and remove their property therefrom on the first opportu-

nity, is a natural and obvious temptation. We therefore respectfully submit that further proof is not properly allowable in this case.

Finally, a word may be directed to the hypothetical cases suggested by the court on the oral argument.

A French cruiser in our war of independence, after France appeared as our active ally, could not have made valid prize of an American merchant vessel or fishing vessel flying the American flag. Probably a French cruiser would not have made such a seizure, nor would the French prize courts have sustained it if made, although their prize decisions later, during the Napoleonic wars, appeared to ignore their previous relations and their existing obligations to us. But there was an American flag throughout our war of independence. France had fully recognized our belligerency and independence, and the two nations were acting as cordial allies on land and sea. In the present case there was a Cuban flag, which had long been the badge of the insurgent cause, and was not used on the water only because of the weakness of the Cuban party; it might have been so used, but the claimants here did not carry it on their vessels. The risks were obvious, and assuming (which is not admitted) that they were favorable to the Cuban side, they did not choose to incur the risks.

Again, in the other case suggested of an American vessel in our war of independence flying the British flag and seized by a French cruiser, we submit that such a vessel would have been good prize, and would promptly have been condemned in the French courts, because it

would appear that there was no true American claim—that the claimants were of the American Tory party and were British adherents. That is just this case—all the indicia and analogies show that the claimants were not Cubans, nor their vessels Cuban vessels, but that they were Spaniards and their vessels enemy vessels.

Respectfully submitted.

HENRY M. HOYT,
Assistant Attorney-General.

No. 395 and 396.
Add'l Brf. of Atty. Gen'l.

Filed Nov. 11, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK "PAQUETE HABANA," Juan Pasos, claimant, appellant, *v.* THE UNITED STATES.	No. 395.
THE SPANISH SCHOONER "LOLA," Tomas Betancourt, claimant, appellant, *v.* THE UNITED STATES.	No. 396.

FISHING SMACK CASES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

STATEMENT ON BEHALF OF THE UNITED STATES RELATIVE TO EXEMPTION ALLOWED TO FISHING VESSELS IN THE MEXICAN WAR.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PASOS, claimant, appellant,
v.
THE UNITED STATES. } No. 395.

THE SPANISH SCHOONER "LOLA," TOMAS BETANCOURT, claimant, appellant,
v.
THE UNITED STATES. } No. 396.

FISHING SMACK CASES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

STATEMENT ON BEHALF OF THE UNITED STATES RELATIVE TO EXEMPTION ALLOWED TO FISHING VESSELS IN THE MEXICAN WAR.

It is respectfully submitted to the court that no reference can be found in American writers to this fact. In treating of the subject they do not mention the Mexican war. (See Woolsey's Introduction to the Study of Inter-

national Law, second edition, pages 282–3; Halleck's International Law, San Francisco, 1861, pages 493–4; Dana's Wheaton, eighth edition, page 431, note to section 345.) Wharton's Digest of International Law refers to the subject of exemption to fishing vessels (sec. 345) only by quoting from Halleck, pages 493–4. As to English writers, Lawrence's Principles of International Law, Boston, 1895, does not refer to the Mexican war in treating of fishing vessels (p. 383), although reference is made to exemption by express treaty stipulations with Prussia under the conventions with that power of 1785, 1799, and 1828. Hall makes the statement, but merely refers to Calvo as his authority. (Hall's Treatise on International Law, p. 468.) Calvo's statement is contained on pages 326–7. (Le Droit International, Paris, 1896, IV, § 2372.) De Boeck, in his "Propriété Privée Ennemie sous Pavillon Ennemi," also states the fact, referring to Calvo and to Ortolan (p. 222).

No existing treaties of the United States appear to contain an exemption of fishing boats. The treaties with Spain never did contain any such exemption. The "Treaty of Peace, Friendship, Limits, and Settlement" with Mexico of 1848 (Treaties and Conventions between the United States and other Powers, pp. 681, 691), 9 Stat., 922, 939, contains in the first section of the twenty-second article the following clause, which obviously refers to the future:

> Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every faculty, cultivators of

> the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all persons whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments unmolested in their persons.

This does not exempt fishing boats from seizure as prize, because the persons named are to be "unmolested in their persons;" or, if it should be so regarded, it would not properly include any other than the small open boats, elsewhere at times previously exempted, fishing, as Calvo says, "in proximity to the coast." And the reference is to the "armies of either nation," not to the navies nor to the "forces;" and to the persons exempted as "unarmed and inhabiting unfortified towns, villages, or places." The exemption in the treaties with Prussia, referred to by Lawrence, is precisely to the same effect.

This appeared, upon full inquiry, to be the only basis for the assertion that the United States exempted fishing boats during the Mexican war. The Bureaus of Navigation, both of the Navy and of the Treasury (in the latter of which are kept the records of vessels finally condemned as prize which subsequently obtain a United States register), are unable to find any authority for the statement, either in respect to the fact that fishing boats in the Mexican war were not seized, or if seized were released; or relative to any executive proclamation or order from the Navy Department to the respective commanders. The result of inquiry at the State Department was the same, but on examination of the records of the Mexican war as contained in the library of the Navy Department it is just

learned that in one of certain original volumes of correspondence and instructions relating to naval operations, which were, at the periods to which they relate, held to be confidential, appear the following letter and order on the subject:

U. S. SHIP CUMBERLAND,
OFF BRAZOS SANTIAGO,
May 14, 1846.

SIR:

* * * * *

Enclosed is a copy of my instructions to the commanders of vessels of the Home Squadron showing the principles to be observed in the blockade of the Mexican ports.

I am, very respectfully, etc.,

D. CONNER,
Comdg. Home Squadron.

Hon. GEO. BANCROFT,
Secretary of the Navy,
Washington.

[Enclosure.]

[Instructions to be observed by officers commanding vessels, &c.]

* * * * *

Mexican boats engaged exclusively in fishing on any part of the coast will be allowed to pursue their labours unmolested. * * *

(Signed)

D. CONNER,
Comdg. Home Squadron.

U. S. SHIP CUMBERLAND,
OFF BRAZOS SANTIAGO,
May 14, 1846.

Approved by the Department June 10, 1846.

All proclamations issued by the Executive appear in the various volumes of the statutes. Vol. 9, covering the period of the Mexican war, does not reveal any proclamation of the exemption of fishing vessels. In the report of the Secretary of the Navy for 1846 (Navy Reports, 1846–1848) appears, at pages 673, 674, the following instruction to the naval commanders, signed by Commodore Stockton: "You will capture all vessels under the Mexican flag that you may be able to take."

The only record on the subject in the Spanish war in the Navy Department, either published or unpublished, is that shown on page 178 of the appendix to the Report of the Chief of the Bureau of Navigation for 1898, in the telegram from Rear-Admiral Sampson to the Secretary of the Navy, dated off Havana, April 28, 1898, and that from the Secretary of the Navy in reply, dated Washington, April 30.

The English rule (which is an instructive guide to American practice) plainly is that such an exemption is at all times in the control of the Executive, and the Executive did not grant it in the Spanish war.

HENRY M. HOYT,
Assistant Attorney-General.

○

[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK PAQUETE HABANA, Juan Pasos, claimant, appellant, *v.* THE UNITED STATES. } No. 395.

THE SPANISH SCHOONER LOLA, TOMAS Betancourt, claimant, appellant, *v.* THE UNITED STATES. } No. 396.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

MOTION TO MODIFY DECEEE.

The Solicitor-General, on behalf of the United States, respectfully moves the court to modify the decree in these causes by vacating the allowance of damages, or so restricting such allowance as to make the damages merely compensatory.

Under the circumstances, in view of the finding of the court as to the law, it may be that compensation in the nature of interest should be granted, so that the claimants may be restored to the position they occupied before the capture—in other words, that they shall be made whole; but, taking the decree as it stands, it will be urged when the mandate goes down that the damages allowed by the court, in addition to costs, implies that the capture was not only without probable cause in the usual sense, but was wholly groundless and even grossly unjustifiable, and that in assessing damages, not only compensation, but punishment, should be kept in mind. It will be urged that the rule now announced by this court has in effect heretofore been clear and definite; that ignorance of this rule can not excuse, and that the capture, therefore, was, in the view of the law, a malicious tort. Counsel for the claimants will insist that the unrestricted award of damages in a prize case is not merely compensatory, but punitive in character; that it is a rebuke for a marine trespass, whether intentional or unintentional; and if unintentional, that ignorance of the law which forbade it is no excuse.

In war a high degree of vigilance and a strict discharge of duty are expected from every naval officer. Fishing vessels of the enemy have often been used as dangerous auxiliaries by acting as spies or conveying information. In the exigencies of war, heretofore at least, a naval commander could not institute an inquiry regarding the objects of fishing vessels and safely adjudge the innocent intent of those on board the craft and accordingly release them, unless he had been expresly authorized to do so.

It is submitted that since there was no express exemption in this war, and since the authorities show that up to the present time grave doubt has existed as to the existence and recognition of the rule now authoritatively expounded by the court, the captors can not fairly be charged with damages consequent upon the breach of a law of which they were ignorant.

The precedent of our own executive action in the Mexican war was not a known and published order, but was hidden away in an original manuscript volume of correspondence and instructions which had escaped the definite knowledge of the text writers, as well as the attention of the executive department most nearly concerned, and was brought to light with some difficulty. By its terms it allowed Mexican boats engaged *exclusively* in fishing on any part of the coast to pursue their labors unmolested. The records in the cases at bar show that fishing was not the exclusive occupation of these boats. In the Crimean war the authorities seem to show that the allied English and French forces seized Russian fishing boats.

In the case of the *Crescent City Live Stock Co.* v. *Butchers' Union* (120 U. S., 141; see especially p. 149 and the first paragraph of p. 158) it was held that although a decree of a lower court may be reversed on appeal, such decree so far retains its force that it is a bar to a suit for malicious prosecution. The analogy of that authority suggests stronger reasons for a similar claim on behalf of the captors in the cases before the court. No malice can possibly be attributed to them. Hence the decree of the court below, which was approved by the

dissenting opinion of this court, in itself justifies the contention that probable cause for the seizure existed.

In *The Marianna Flora* (11 Wheat., 1), it was held that the commander of a cruiser, having fairly exercised his discretion in judging whether an attack upon him by a foreign vessel was piratical, can not be held responsible in damages for not having come to the conclusion which upon a subsequent judicial investigation appears to be correct.

Probable cause exists where there are circumstances sufficient to warrant a reasonable ground of suspicion, even though not sufficient to warrant condemnation. "And such is the view held by all writers on maritime warfare and prize. To adopt a harsher rule and hold that the captors must decide for themselves the merits of each case would involve perils which few would be willing to encounter." (*The Thompson*, 3 Wall., 155, 163, and auth. cit.)

As to the measure of compensation, the case of *The Apollon* (9 Wheat., 362), although not similar to those at bar, states the general rule by Story, J., as follows (pp. 96, 97):

> This court on various occasions has expressed its decided opinion that the probable profits of a voyage, either upon the ship or cargo, can not furnish any just basis for the computation of damages in cases of marine tort. * * * Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted as a fair recompense, and the addition of 10 per cent has been sometimes made where the property

> was sold under disadvantageous circumstances or had not arrived at the country of its destination. Such, it is believed, has been the rule most generally adopted in practice in cases which do not call for aggravated or vindictive damages.

From that case it seems that sale of cargo under a perishable monition is not always disadvantageous, because it may obtain a higher price than the appraisement.

See also the case of *Maley* v. *Shattuck* (3 Cr., 458), where it appears that a naval commander properly stopped and searched a neutral vessel, but, in the exercise of his judgment on the propriety of detaining her, the circumstances of suspicion in the case were not sufficiently strong to justify the seizure which was made.

The case of *The Amiable Nancy* (3 Wheat., 546) considers costs and damages upon facts which disclose a gross and wanton outrage by the boat's crew of a privateer without just provocation or excuse.

It is submitted, in view of these authorities respecting *neutral vessels*—in which the decrees below were against the captors, either absolutely or substantially—that even where probable cause was wanting, the measure of damages was compensatory only and not vindictive, unless the case presented a wanton outrage. Here I have sought to show, on the authority of other adjudications of the court, that there was probable cause; *a fortiori*, therefore, the claimants should be held by the terms of the court's decree to a moderate compensation for the loss.

It is respectfully submitted in conclusion that the motion may properly prevail, so that the claimants shall

receive the proceeds of the vessels and cargoes, with such additional compensation by way of interest on the value thereof as may seem meet, but not damages as for a wholly unjustifiable seizure.

JOHN K. RICHARDS,
Solicitor-General.

HENRY M. HOYT,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK PAQUETE HABANA, Juan Pasos, claimant, appellant, *v.* THE UNITED STATES. } No. 395.

THE SPANISH SCHOONER LOLA, TOMAS Betancourt, claimant, appellant, *v.* THE UNITED STATES. } No. 396.

IN PRIZE.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

MOTION BY THE UNITED STATES TO ADVANCE, WITH SUGGESTION TO REASSIGN OTHER PRIZE CASES AND ASSIGN THE FOREGOING WITH THEM.

Upon the result in these cases depend, by agreement between the Government and the respective claimants, several other similar cases in the southern district of

Florida, known as the "fishing smack" cases. These, and some or all of the other vessels involved, contained cargoes of fish. The court below, having entered a final decree of condemnation of vessel and cargo in each case, set aside the decree and permitted a claim to be filed, and then reinstated the decree on the ground that there was no warrant in law for the claimants' contention that fishing vessels of this class are exempt from seizure without ordinance, treaty, or proclamation to that effect. (*Paquete Habana* record, p. 15; *Lola* record, p. 14.)

The convenience of the court, the importance of finally determining prize questions promptly, and the perhaps peculiar right of claimants of the class here involved to a speedy settlement, are the grounds of this motion to advance which is made on the claimants' initiative.

It is also respectfully suggested that as the international bearing of prize adjudications invokes a hearing before the full bench, all prize cases heretofore specially assigned, and these cases, shall be reassigned and assigned together at such later date as may suit the court. In this suggestion counsel for appellants herein acquiesce.

JOHN K. RICHARDS,
Solicitor-General.

Syllabus.

THE PAQUETE HABANA.

THE LOLA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

Nos. 395, 396. Argued November 7, 8, 1899. — Decided January 8, 1900.

Under the act of Congress of March 3, 1891, c. 517, this court has jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the District Judge as to the importance of the particular case.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

At the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. And this rule is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

At the breaking out of the recent war with Spain, two fishing smacks — the one a sloop, 43 feet long on the keel and of 25 tons burden, and with a crew of three men, and the other a schooner, 51 feet long on the keel and of 35 tons burden, and with a crew of six men — were regularly engaged in fishing on the coast of Cuba, sailing under the Spanish flag, and each owned by a Spanish subject, residing in Havana; her crew, who also resided there, had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner; and her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Each vessel left Havana on a coast fishing voyage, and sailed along the coast of Cuba about two hundred miles to the west end of the island; the sloop there fished for twenty-five days in the territorial waters of Spain; and the schooner extended her fishing trip a hundred

miles farther across the Yucatan Channel, and fished for eight days on the coast of Yucatan. On her return, with her cargo of live fish, along the coast of Cuba, and when near Havana, each was captured by one of the United States blockading squadron. Neither fishing vessel had any arms or ammunition on board; had any knowledge of the blockade, or even of the war, until she was stopped by a blockading vessel; made any attempt to run the blockade, or any resistance at the time of her capture; nor was there any evidence that she, or her crew, was likely to aid the enemy. *Held*, that both captures were unlawful, and without probable cause.

THE cases are stated in the opinion of the court.

Mr. J. Parker Kirlin for appellants.

Mr. Assistant Attorney General Hoyt for the United States.

Mr. Joseph K. McCammon and *Mr. James H. Hayden* filed a brief for the captors. *Mr. George A. King* and *Mr. William B. King* filed a brief "for certain captors."

MR. JUSTICE GRAY delivered the opinion of the court.

These are two appeals from decrees of the District Court of the United States for the Southern District of Florida, condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Cuban birth, living in the city of Havana; was commanded by a subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron, she had no knowledge of the existence of the war, or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

The Paquete Habana was a sloop, 43 feet long on the keel,

and of 25 tons burden, and had a crew of three Cubans, including the master, who had a fishing license from the Spanish Government, and no other commission or license. She left Havana March 25, 1898; sailed along the coast of Cuba to Cape San Antonio at the western end of the island, and there fished for twenty-five days, lying between the reefs off the cape, within the territorial waters of Spain; and then started back for Havana, with a cargo of about 40 quintals of live fish. On April 25, 1898, about two miles off Mariel, and eleven miles from Havana, she was captured by the United States gunboat Castine.

The Lola was a schooner, 51 feet long on the keel, and of 35 tons burden, and had a crew of six Cubans, including the master, and no commission or license. She left Havana April 11, 1898, and proceeded to Campeachy Sound off Yucatan, fished there eight days, and started back for Havana with a cargo of about 10,000 pounds of live fish. On April 26, 1898, near Havana, she was stopped by the United States steamship Cincinnati, and was warned not to go into Havana, but was told that she would be allowed to land at Bahia Honda. She then changed her course, and put for Bahia Honda, but on the next morning, when near that port, was captured by the United States steamship Dolphin.

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master, on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, "the court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure."

Each vessel was thereupon sold by auction; the Paquete Habana for the sum of $490; and the Lola for the sum of $800. There was no other evidence in the record of the value of either vessel or of her cargo.

It has been suggested, in behalf of the United States, that

this court has no jurisdiction to hear and determine these appeals, because the matter in dispute in either case does not exceed the sum or value of $2000, and the District Judge has not certified that the adjudication involves a question of general importance.

The suggestion is founded on section 695 of the Revised Statutes, which provides that "an appeal shall be allowed to the Supreme Court from all final decrees of any District Court in prize causes where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed, without reference to the matter in dispute, on the certificate of the District Judge that the adjudication involves a question of general importance."

The Judiciary Acts of the United States, for a century after the organization of the Government under the Constitution, did impose pecuniary limits upon appellate jurisdiction.

In actions at law and suits in equity, the pecuniary limit of the appellate jurisdiction of this court from the Circuit Courts of the United States was for a long time fixed at $2000. Acts of September 24, 1789, c. 20, § 22; 1 Stat. 84; March 3, 1803, c. 40; 2 Stat. 244; *Gordon* v. *Ogden*, 3 Pet. 33; Rev. Stat. §§ 691, 692. In 1875 it was raised to $5000. Act of February 16, 1875, c. 77, § 3; 18 Stat. 316. And in 1889 this was modified by providing that, where the judgment or decree did not exceed the sum of $5000, this court should have appellate jurisdiction upon the question of the jurisdiction of the Circuit Court, and upon that question only. Act of February 25, 1889, c. 236, § 1; 25 Stat. 693; *Parker* v. *Ormsby*, 141 U. S. 81.

As to cases of admiralty and maritime jurisdiction, including prize causes, the Judiciary Act of 1789, in § 9, vested the original jurisdiction in the District Courts, without regard to the sum or value in controversy; and in § 21, permitted an appeal from them to the Circuit Court where the matter in dispute exceeded the sum or value of $300. 1 Stat. 77, 83; *The Betsey*, 3 Dall. 6, 16; *The Amiable Nancy*, 3 Wheat. 546; *Stratton* v. *Jarvis*, 8 Pet. 4, 11. By the act of March 3, 1803, c. 40, appeals to the Circuit Court were permitted from all final decrees of a District Court where

the matter in dispute exceeded the sum or value of $50; and from the Circuit Courts to this court in all cases "of admiralty and maritime jurisdiction, and of prize or no prize," in which the matter in dispute exceeded the sum or value of $2000. 2 Stat. 244; *Jenks* v. *Lewis*, 3 Mason, 503; *Stratton* v. *Jarvis*, above cited; *The Admiral*, 3 Wall. 603, 612. The acts of March 3, 1863, c. 86, § 7, and June 30, 1864, c. 174, § 13, provided that appeals from the District Courts in prize causes should lie directly to this court, where the amount in controversy exceeded $2000, "or on the certificate of the District Judge that the adjudication involves a question of general importance." 12 Stat. 760; 13 Stat. 310. The provision of the act of 1803, omitting the words, "and of prize or no prize," was reënacted in section 692 of the Revised Statutes; and the provision of the act of 1864, concerning prize causes, was substantially reënacted in section 695 of the Revised Statutes, already quoted.

But all this has been changed by the act of March 3, 1891, c. 517, establishing the Circuit Courts of Appeals, and creating a new and complete scheme of appellate jurisdiction, depending upon the nature of the different cases, rather than upon the pecuniary amount involved. 26 Stat. 826.

By that act, as this court has declared, the entire appellate jurisdiction from the Circuit and District Courts of the United States was distributed, "according to the scheme of the act," between this court and the Circuit Courts of Appeals thereby established, "by designating the classes of cases" of which each of these courts was to have final jurisdiction. *McLish* v. *Roff*, 141 U. S. 661, 666; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 382; *Carey* v. *Houston & Texas Railway*, 150 U. S. 170, 179.

The intention of Congress, by the act of 1891, to make the nature of the case, and not the amount in dispute, the test of the appellate jurisdiction of this court from the District and Circuit Courts clearly appears upon examination of the leading provisions of the act.

Section 4 provides that no appeal, whether by writ of error or otherwise, shall hereafter be taken from a District Court

to a Circuit Court; but that all appeals, by writ of error or otherwise, from the District Courts, "shall only be subject to review" in this court, or in the Circuit Court of Appeals, "as is hereinafter provided," and "the review, by appeal, by writ of error, or otherwise," from the Circuit Courts, "shall be had only" in this court, or in the Circuit Court of Appeals, "according to the provisions of this act regulating the same."

Section 5 provides that "appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court, in the following cases:"

First. "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." This clause includes "any case," without regard to amount, in which the jurisdiction of the court below is in issue; and differs in this respect from the act of 1889, above cited.

Second. "From the final sentences and decrees in prize causes." This clause includes the whole class of "the final sentences and decrees in prize causes," and omits all provisions of former acts regarding amount in controversy, or certificate of a District Judge.

Third. "In cases of conviction of a capital or otherwise infamous crime." This clause looks to the nature of the crime, and not to the extent of the punishment actually imposed. A crime which might have been punished by imprisonment in a penitentiary is an infamous crime, even if the sentence actually pronounced is of a small fine only. *Ex parte Wilson*, 114 U. S. 417, 426. Consequently, such a sentence for such a crime was subject to the appellate jurisdiction of this court, under this clause, until this jurisdiction, so far as regards crimes not capital, was transferred to the Circuit Court of Appeals by the act of January 20, 1897, c. 68. 29 Stat. 492.

Fourth. "In any case that involves the construction or application of the Constitution of the United States."

Fifth. "In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

Sixth. "In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

Each of these last three clauses, again, includes "any case" of the class mentioned. They all relate to what are commonly called Federal questions, and cannot reasonably be construed to have intended that the appellate jurisdiction of this court over such questions should be restricted by any pecuniary limit — especially in their connection with the succeeding sentence of the same section: "Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases." Writs of error from this court to review the judgments of the highest court of a State upon such questions have never been subject to any pecuniary limit. Act of September 24, 1789, c. 20, § 25; 1 Stat. 85; *Buel* v. *Van Ness*, 8 Wheat. 312; act of February 5, 1867, c. 28, § 2; 14 Stat. 386; Rev. Stat. § 709.

By section 6 of the act of 1891, this court is relieved of much of the appellate jurisdiction that it had before; the appellate jurisdiction from the District and Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," is vested in the Circuit Court of Appeals; and its decisions in admiralty cases, as well as in cases arising under the criminal laws, and in certain other classes of cases, are made final, except that that court may certify to this court questions of law, and that this court may order up the whole case by writ of certiorari. It is settled that the words "unless otherwise provided by law," in this section, refer only to provisions of the same act, or of contemporaneous or subsequent acts, and do not include provisions of earlier statutes. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 57; *Hubbard* v. *Soby*, 146 U. S. 56; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 383.

The act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or of the Circuit Court of Appeals, from a District or Circuit Court of the United States. The only pecuniary limit imposed is one of

$1000 upon the appeal to this court of a case which has been once decided on appeal in the Circuit Court of Appeals, and in which the judgment of that court is not made final by section 6 of the act.

Section 14 of the act of 1891, after specifically repealing section 691 of the Revised Statutes and section 3 of the act of February 16, 1875, further provides that "all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act, are hereby repealed." 26 Stat. 829, 830. The object of the specific repeal, as this court has declared, was to get rid of the pecuniary limit in the acts referred to. *McLish* v. *Roff*, 141 U. S. 661, 667. And, although neither section 692 nor section 695 of the Revised Statutes is repealed by name, yet, taking into consideration the general repealing clause, together with the affirmative provisions of the act, the case comes within the reason of the decision in an analogous case, in which this court said: "The provisions relating to the subject-matter under consideration are, however, so comprehensive, as well as so variant from those of former acts, that we think the intention to substitute the one for the other is necessarily to be inferred and must prevail." *Fisk* v. *Henarie*, 142 U. S. 459, 468.

The decision of this court in the recent case of *United States* v. *Rider*, 163 U. S. 132, affords an important, if not controlling precedent. From the beginning of this century until the passage of the act of 1891, both in civil and in criminal cases, questions of law, upon which two judges of the Circuit Court were divided in opinion, might be certified by them to this court for decision. Acts of: April 29, 1802, c. 31, § 6; 2 Stat. 159; June 1, 1872, c. 255, § 1; 17 Stat. 196; Rev. Stat. §§ 650–652, 693, 697; *Insurance Co.* v. *Dunham*, 11 Wall. 1, 21; *United States* v. *Sanges*, 144 U. S. 310, 320. But in *United States* v. *Rider*, it was adjudged by this court that the act of 1891 had superseded and repealed the earlier acts authorizing questions of law to be certified from the Circuit Court to this court; and the grounds of that adjudication sufficiently appear by

the statement of the effect of the act of 1891 in two passages of the opinion: "Appellate jurisdiction was given in all criminal cases by writ of error, either from this court or from the Circuit Courts of Appeals, and in all civil cases by appeal or error, without regard to the amount in controversy, except as to appeals or writs of error to or from the Circuit Courts of Appeals in cases not made final, as specified in § 6." "It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose and its terms, the act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate." 163 U. S. 138–140.

That judgment was thus rested upon two successive propositions: First, that the act of 1891 gives appellate jurisdiction, either to this court or to the Circuit Court of Appeals, in all criminal cases, and in all civil cases "without regard to the amount in controversy." Second, that the act, by its terms, its scope and its obvious purpose, "furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate."

As was long ago said by Chief Justice Marshall, "the spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." *Durousseau* v. *United States*, 6 Cranch, 307, 314. And it is a well settled rule in the construction of statutes, often affirmed and applied by this court, that, "even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." *United States* v. *Tynen*, 11 Wall. 88, 92; *King* v. *Cornell*, 106 U. S. 395, 396; *Tracy* v. *Tuffly*, 134 U. S. 206, 223; *Fisk* v. *Henarie*, 142 U. S. 459, 468; *District of Columbia* v. *Hutton*, 143 U. S. 18, 27; *United States* v. *Healey*, 160 U. S. 136, 147.

We are of opinion that the act of 1891, upon its face, read

in the light of settled rules of statutory construction, and of the decisions of this court, clearly manifests the intention of Congress to cover the whole subject of the appellate jurisdiction from the District and Circuit Courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of Congress, including those that imposed pecuniary limits upon such jurisdiction; and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the District Judge as to the importance of the particular case.

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notably in 2 Ortolan, Règles Internationales et Diplomatie de la Mer, (4th ed.) lib. 3, c. 2, pp. 51–56; in 4 Calvo, Droit International, (5th ed.) §§ 2367–2373; in De Boeck, Propriété Privée Ennemie sous Pavillon Ennemi, §§ 191–196; and in Hall, International Law, (4th. ed.) § 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.

The earliest acts of any government on the subject, men-

tioned in the books, either emanated from, or were approved by, a King of England.

In 1403 and 1406, Henry IV issued orders to his admirals and other officers, entitled "Concerning Safety for Fishermen — *De Securitate pro Piscatoribus.*" By an order of October 26, 1403, reciting that it was made pursuant to a treaty between himself and the King of France; and for the greater safety of the fishermen of either country, and so that they could be, and carry on their industry, the more safely on the sea, and deal with each other in peace; and that the French King had consented that English fishermen should be treated likewise; it was ordained that French fishermen might, during the then pending season for the herring fishery, safely fish for herrings and all other fish, from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hautoune. And by an order of October 5, 1406, he took into his safe conduct, and under his special protection, guardianship and defence, all and singular the fishermen of France, Flanders and Brittany, with their fishing vessels and boats, everywhere on the sea, through and within his dominions, jurisdictions and territories, in regard to their fishery, while sailing, coming and going, and, at their pleasure, freely and lawfully fishing, delaying or proceeding, and returning homeward with their catch of fish, without any molestation or hindrance whatever; and also their fish, nets, and other property and goods soever; and it was therefore ordered that such fishermen should not be interfered with, provided they should comport themselves well and properly, and should not, by color of these presents, do or attempt, or presume to do or attempt, anything that could prejudice the King, or his kingdom of England, or his subjects. 8 Rymer's Foedera, 336, 451.

The treaty made October 2, 1521, between the Emperor Charles V and Francis I of France, through their ambassadors, recited that a great and fierce war had arisen between them, because of which there had been, both by land and by sea, frequent depredations and incursions on either side, to the grave detriment and intolerable injury of the innocent

subjects of each; and that a suitable time for the herring fishery was at hand, and, by reason of the sea being beset by the enemy, the fishermen did not dare to go out, whereby the subject of their industry, bestowed by heaven to allay the hunger of the poor, would wholly fail for the year, unless it were otherwise provided — *quo fit, ut piscaturæ commoditas, ad pauperum levandam famem a cœlesti numine concessa, cessare hoc anno omnino debeat, nisi aliter provideatur.* And it was therefore agreed that the subjects of each sovereign, fishing in the sea, or exercising the calling of fishermen, could and might, until the end of the next January, without incurring any attack, depredation, molestation, trouble or hindrance soever, safely and freely, everywhere in the sea, take herrings and every other kind of fish, the existing war by land and sea notwithstanding; and further that, during the time aforesaid, no subject of either sovereign should commit, or attempt or presume to commit, any depredation, force, violence, molestation or vexation, to or upon such fishermen, or their vessels, supplies, equipments, nets and fish, or other goods soever truly appertaining to fishing. The treaty was made at Calais, then an English possession. It recites that the ambassadors of the two sovereigns met there at the earnest request of Henry VIII, and with his countenance, and in the presence of Cardinal Wolsey, his chancellor and representative. And towards the end of the treaty it is agreed that the said King and his said representative, "by whose means the treaty stands concluded, shall be conservators of the agreements therein, as if thereto by both parties elected and chosen." 4 Dumont, Corps Diplomatique, pt. 1, pp. 352, 353.

The herring fishery was permitted, in time of war, by French and Dutch edicts in 1536. Bynkershoek, Quæstiones Juris Publicæ, lib. 1, c. 3; 1 Emerigon des Assurances, c. 4, sect. 9; c. 12, sect. 19, § 8.

France, from remote times, set the example of alleviating the evils of war in favor of all coast fishermen. In the compilation entitled Us et Coutumes de la Mer, published by Cleirac in 1661, and in the third part thereof, containing "Maritime or Admiralty Jurisdiction — *la Jurisdiction de la*

Opinion of the Court.

Marine ou d'Admirauté — as well in time of peace as in time of war," article 80 is as follows: "The admiral may in time of war accord fishing truces — *tresves pescheresses* — to the enemy and to his subjects; provided that the enemy will likewise accord them to Frenchmen." Cleirac, 544. Under this article, reference is made to articles 49 and 79 respectively of the French ordinances concerning the Admiralty in 1543 and 1584, of which it is but a reproduction. 4 Pardessus, Collection de Lois Maritimes, 319; 2 Ortolan, 51. And Cleirac adds, in a note, this quotation from Froissart's Chronicles: "Fishermen on the sea, whatever war there were in France and England, never did harm to one another; so they are friends, and help one another at need — *Pescheurs sur mer, quelque guerre qui soit en France et Angleterre, jamais ne se firent mal l'un à l'autre; ainçois sont amis, et s'aydent l'un à l'autre au besoin.*"

The same custom would seem to have prevailed in France until towards the end of the seventeenth century. For example, in 1675, Louis XIV and the States General of Holland, by mutual agreement, granted to Dutch and French fishermen the liberty, undisturbed by their vessels of war, of fishing along the coasts of France, Holland and England. D'Hauterive et De Cussy, Traités de Commerce, pt. 1, vol. 2, p. 278. But by the ordinances of 1681 and 1692 the practice was discontinued, because, Valin says, of the faithless conduct of the enemies of France, who, abusing the good faith with which she had always observed the treaties, habitually carried off her fishermen, while their own fished in safety. 2 Valin sur l'Ordonnance de la Marine, (1776) 689, 690; 2 Ortolan, 52; De Boeck, § 192.

The doctrine which exempts coast fishermen with their vessels and cargoes from capture as prize of war has been familiar to the United States from the time of the War of Independence.

On June 5, 1779, Louis XVI, our ally in that war, addressed a letter to his admiral, informing him that the wish he had always had of alleviating, as far as he could, the hardships of war, had directed his attention to that class of his subjects

which devoted itself to the trade of fishing, and had no other means of livelihood; that he had thought that the example which he should give to his enemies, and which could have no other source than the sentiments of humanity which inspired him, would determine them to allow to fishermen the same facilities which he should consent to grant; and that he had therefore given orders to the commanders of all his ships not to disturb English fishermen, nor to arrest their vessels laden with fresh fish, even if not caught by those vessels; provided they had no offensive arms, and were not proved to have made any signals creating a suspicion of intelligence with the enemy; and the admiral was directed to communicate the King's intentions to all officers under his control. By a royal order in council of November 6, 1780, the former orders were confirmed; and the capture and ransom, by a French cruiser, of *The John and Sarah*, an English vessel, coming from Holland, laden with fresh fish, were pronounced to be illegal. 2 Code des Prises, (ed. 1784) 721, 901, 903.

Among the standing orders made by Sir James Marriott, Judge of the English High Court of Admiralty, was one of April 11, 1780, by which it was "ordered, that all causes of prize of fishing boats or vessels taken from the enemy may be consolidated in one monition, and one sentence or interlocutory, if under fifty tons burden, and not more than six in number." Marriott's Formulary, 4. But by the statements of his successor, and of both French and English writers, it appears that England, as well as France, during the American Revolutionary War, abstained from interfering with the coast fisheries. *The Young Jacob and Johanna*, 1 C. Rob. 20; 2 Ortolan, 53; Hall, § 148.

In the treaty of 1785 between the United States and Prussia, article 23, (which was proposed by the American Commissioners, John Adams, Benjamin Franklin and Thomas Jefferson, and is said to have been drawn up by Franklin,) provided that, if war should arise between the contracting parties, "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen,

unarmed and inhabiting unfortified towns, villages or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons; nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted, by the armed force of the enemy, into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price." 8 Stat. 96; 1 Kent Com. 91 note; Wheaton's History of the Law of Nations, 306, 308. Here was the clearest exemption from hostile molestation or seizure of the persons, occupations, houses and goods of unarmed fishermen inhabiting unfortified places. The article was repeated in the later treaties between the United States and Prussia of 1799 and 1828. 8 Stat. 174, 384. And Dana, in a note to his edition of Wheaton's International Law, says: "In many treaties and decrees, fishermen catching fish as an article of food are added to the class of persons whose occupation is not to be disturbed in war." Wheaton's International Law, (8th ed.) § 345, note 168.

Since the United States became a nation, the only serious interruptions, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.

In the first years of those wars, England having authorized the capture of French fishermen, a decree of the French National Convention of October 2, 1793, directed the executive power "to protest against this conduct, theretofore without example; to reclaim the fishing boats seized; and, in case of refusal, to resort to reprisals." But in July, 1796, the Committee of Public Safety ordered the release of English fishermen seized under the former decree, "not considering them as prisoners of war." *La Nostra Segnora de la Piedad*, (1801) cited below; 2 De Cussy, Droit Maritime, 164, 165; 1 Massé, Droit Commercial, (2d ed.) 266, 267.

On January 24, 1798, the English Government, by express order, instructed the commanders of its ships to seize French and Dutch fishermen with their boats. 6 Martens, Recueil des Traités, (2d ed.) 505; 6 Schoell, Histoire des Traités, 119; 2 Ortolan, 53. After the promulgation of that order, Lord Stowell (then Sir William Scott) in the High Court of Admiralty of England condemned small Dutch fishing vessels as prize of war. In one case, the capture was in April, 1798, and the decree was made November 13, 1798. *The Young Jacob and Johanna*, 1 C. Rob. 20. In another case, the decree was made August 23, 1799. *The Noydt Gedacht*, 2 C. Rob. 137, note.

For the year 1800, the orders of the English and French governments and the correspondence between them may be found in books already referred to. 6 Martens, 503–512; 6 Schoell, 118–120; 2 Ortolan, 53, 54. The doings for that year may be summed up as follows: On March 27, 1800, the French government, unwilling to resort to reprisals, reënacted the orders given by Louis XVI in 1780, above mentioned, prohibiting any seizure by the French ships of English fishermen, unless armed, or proved to have made signals to the enemy. On May 30, 1800, the English government, having received notice of that action of the French government, revoked its order of January 24, 1798. But, soon afterwards, the English government complained that French fishing boats had been made into fireboats at Flushing, as well as that the French government had impressed, and had sent to Brest, to serve in its flotilla, French fishermen and their boats, even those whom the English had released on condition of their not serving; and on January 21, 1801, summarily revoked its last order, and again put in force its order of January 24, 1798. On February 16, 1801, Napoleon Bonaparte, then First Consul, directed the French commissioner at London to return at once to France, first declaring to the English government that its conduct, "contrary to all the usages of civilized nations, and to the common law which governs them, even in time of war, gave to the existing war a character of rage and bitterness which destroyed even the relations usual in a loyal war," and

"tended only to exasperate the two nations, and to put off the term of peace;" and that the French government, having always made it "a maxim to alleviate as much as possible the evils of war, could not think, on its part, of rendering wretched fishermen victims of a prolongation of hostilities, and would abstain from all reprisals."

On March 16, 1801, the Addington Ministry, having come into power in England, revoked the orders of its predecessors against the French fishermen; maintaining, however, that "the freedom of fishing was nowise founded upon an agreement, but upon a simple concession;" that "this concession would be always subordinate to the convenience of the moment," and that "it was never extended to the great fishery, or to commerce in oysters or in fish." And the freedom of the coast fisheries was again allowed on both sides. 6 Martens, 514; 6 Schoell, 121; 2 Ortolan, 54; Manning, Law of Nations, (Amos ed.) 206.

Lord Stowell's judgment in *The Young Jacob and Johanna*, 1 C. Rob. 20, above cited, was much relied on by the counsel for the United States, and deserves careful consideration.

The vessel there condemned is described in the report as "a small Dutch fishing vessel taken April, 1798, on her return from the Dogger bank to Holland;" and Lord Stowell, in delivering judgment, said: "In former wars, it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment, and, as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade." And he added: "It is a farther satisfaction to me in giving this judgment to observe that the facts also bear strong marks of a false and fraudulent transaction."

Both the capture and condemnation were within a year after the order of the English government of January 24, 1798, instructing the commanders of its ships to seize French and Dutch fishing vessels, and before any revocation of that order. Lord Stowell's judgment shows that his decision was based upon the order of 1798, as well as upon strong evidence of fraud. Nothing more was adjudged in the case.

But some expressions in his opinion have been given so much weight by English writers, that it may be well to examine them particularly. The opinion begins by admitting the known custom in former wars not to capture such vessels — adding, however, "but this was a rule of comity only, and not of legal decision." Assuming the phrase "legal decision" to have been there used, in the sense in which courts are accustomed to use it, as equivalent to "judicial decision," it is true that, so far as appears, there had been no such decision on the point in England. The word "comity" was apparently used by Lord Stowell as synonymous with courtesy or good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh: "In the present century a slow and silent, but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the law of nations." Discourse on the Law of Nations, 38; 1 Miscellaneous Works, 360.

The French prize tribunals, both before and after Lord Stowell's decision, took a wholly different view of the general question. In 1780, as already mentioned, an order in council of Louis XVI had declared illegal the capture by a French cruiser of *The John and Sarah*, an English vessel, coming from Holland, laden with fresh fish. And on May 17, 1801, where a Portuguese fishing vessel, with her cargo of fish, having no more crew than was needed for her management, and for serving the nets, on a trip of several days, had been cap-

tured in April, 1801, by a French cruiser, three leagues off the coast of Portugal, the Council of Prizes held that the capture was contrary to "the principles of humanity, and the maxims of international law," and decreed that the vessel, with the fish on board, or the net proceeds of any that had been sold, should be restored to her master. *La Nostra Segnora de la Piedad*, 25 Merlin, Jurisprudence, Prise Maritime, § 3, art. 1, 3; *S. C.* 1 Pistoye et Duverdy, Prises Maritimes, 331; 2 De Cussy, Droit Maritime, 166.

The English government, soon afterwards, more than once unqualifiedly prohibited the molestation of fishing vessels employed in catching and bringing to market fresh fish. On May 23, 1806, it was "ordered in council, that all fishing vessels under Prussian and other colors, and engaged for the purpose of catching fish and conveying them fresh to market, with their crews, cargoes and stores, shall not be molested on their fishing voyages and bringing the same to market; and that no fishing vessels of this description shall hereafter be molested. And the Right Honorable the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty and the Judge of the High Court of Admiralty are to give the necessary directions herein as to them may respectively appertain." 5 C. Rob. 408. Again, in the order in council of May 2, 1810, which directed that "all vessels which shall have cleared out from any port so far under the control of France or her allies as that British vessels may not freely trade thereat, and which are employed in the whale fishery, or other fishery of any description, save as hereinafter excepted, and are returning or destined to return either to the port from whence they cleared, or to any other port or place at which the British flag may not freely trade, shall be captured, and condemned together with their stores and cargoes, as prize to the captors," there were excepted "vessels employed in catching and conveying fish fresh to market, such vessels not being fitted or provided for the curing of fish." Edw. Adm. appx. L.

Wheaton, in his Digest of the Law of Maritime Captures and Prizes, published in 1815, wrote: "It has been usual

in maritime wars to exempt from capture fishing boats and their cargoes, both from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. This custom, so honorable to the humanity of civilized nations, has fallen into disuse; and it is remarkable that both France and England mutually reproach each other with that breach of good faith which has finally abolished it." Wheaton on Captures, c. 2, § 18.

This statement clearly exhibits Wheaton's opinion that the custom had been a general one, as well as that it ought to remain so. His assumption that it had been abolished by the differences between France and England at the close of the last century was hardly justified by the state of things when he wrote, and has not since been borne out.

During the wars of the French Empire, as both French and English writers agree, the coast fisheries were left in peace. 2 Ortolan, 54; De Boeck, § 193; Hall, § 148. De Boeck quaintly and truly adds, "and the incidents of 1800 and of 1801 had no morrow — *n'eurent pas de lendemain.*"

In the war with Mexico in 1846, the United States recognized the exemption of coast fishing boats from capture. In proof of this, counsel have referred to records of the Navy Department, which this court is clearly authorized to consult upon such a question. *Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250, 253.

By those records it appears that Commodore Conner, commanding the Home Squadron blockading the east coast of Mexico, on May 14, 1846, wrote a letter from the ship Cumberland, off Brazos Santiago, near the southern point of Texas, to Mr. Bancroft, the Secretary of the Navy, enclosing a copy of the commodore's "instructions to the commanders of the vessels of the Home Squadron, showing the principles to be observed in the blockade of the Mexican ports," one of which was that "Mexican boats engaged in fishing on any part of the coast will be allowed to pursue their labors unmolested;" and that on June 10, 1846, those instructions were approved by the Navy Department, of which Mr. Bancroft was still the head, and continued to be until he was appointed Minister to

England in September following. Although Commodore Conner's instructions and the Department's approval thereof do not appear in any contemporary publication of the Government, they evidently became generally known at the time, or soon after; for it is stated in several treatises on international law (beginning with Ortolan's second edition, published in 1853) that the United States in the Mexican War permitted the coast fishermen of the enemy to continue the free exercise of their industry. 2 Ortolan, (2d ed.) 49 note; (4th ed.) 55; 4 Calvo, (5th ed.) § 2372; De Boeck, § 194; Hall, (4th ed.) § 148.

As qualifying the effect of those statements, the counsel for the United States relied on a proclamation of Commodore Stockton, commanding the Pacific Squadron, dated August 20, 1846, directing officers under his command to proceed immediately to blockade the ports of Mazatlan and San Blas on the west coast of Mexico, and saying to them, "All neutral vessels that you may find there you will allow twenty days to depart; and you will make the blockade absolute against all vessels, except armed vessels of neutral nations. You will capture all vessels under the Mexican flag that you may be able to take." Navy Report of 1846, pp. 673, 674. But there is nothing to show that Commodore Stockton intended, or that the Government approved, the capture of coast fishing vessels.

On the contrary, General Halleck, in the preface to his work on International Law or Rules Regulating the Intercourse of States in Peace and War, published in 1861, says that he began that work, during the war between the United States and Mexico, "while serving on the staff of the commander of the Pacific Squadron" and "often required to give opinions on questions of international law growing out of the operations of the war." Had the practice of the blockading squadron on the west coast of Mexico during that war, in regard to fishing vessels, differed from that approved by the Navy Department on the east coast, General Halleck could hardly have failed to mention it, when stating the prevailing doctrine upon the subject as follows:

"Fishing boats have also, as a general rule, been exempted from the effects of hostilities. As early as 1521, while war was raging between Charles V and Francis, ambassadors from these two sovereigns met at Calais, then English, and agreed that, whereas the herring fishery was about to commence, the subjects of both belligerents, engaged in this pursuit, should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French governments issued formal instructions exempting the fishing boats of each other's subjects from seizure. This order was subsequently rescinded by the British government, on the alleged ground that some French fishing boats were equipped as gunboats, and that some French fishermen, who had been prisoners in England, had violated their parole not to serve, and had gone to join the French fleet at Brest. Such excuses were evidently mere pretexts, and, after some angry discussions had taken place on the subject, the British restriction was withdrawn, and the freedom of fishing was again allowed on both sides. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers." Halleck, (1st ed.) c. 20, § 23.

That edition was the only one sent out under the author's own auspices, except an abridgment, entitled Elements of International Law and the Law of War, which he published in 1866, as he said in the preface, to supply a suitable text-book for instruction upon the subject, "not only in our colleges, but also in our two great national schools — the Military and Naval Academies." In that abridgment, the statement as to fishing boats was condensed, as follows: "Fishing boats have also, as a general rule, been exempted from the effects of hostilities. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers." Halleck's Elements, c. 20, § 21.

In the treaty of peace between the United States and Mex-

ico in 1848 were inserted the very words of the earlier treaties with Prussia, already quoted, forbidding the hostile molestation or seizure in time of war of the persons, occupations, houses or goods of fishermen. 9 Stat. 939, 940.

Wharton's Digest of the International Law of the United States, published by authority of Congress in 1886 and 1887, embodies General Halleck's fuller statement, above quoted, and contains nothing else upon the subject. 3 Whart. Int. Law Dig. § 345, p. 315; 2 Halleck, (Eng. eds. 1873 and 1878) p. 151.

France, in the Crimean War in 1854, and in her wars with Austria in 1859 and with Germany in 1870, by general orders, forbade her cruisers to trouble the coast fisheries, or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary. Calvo, § 2372; Hall, § 148; 2 Ortolan, (4th ed.) 449; 10 Revue de Droit International, (1878) 399.

Calvo says that in the Crimean War, "notwithstanding her alliance with France and Italy, England did not follow the same line of conduct, and her cruisers in the Sea of Azof destroyed the fisheries, nets, fishing implements, provisions, boats, and even the cabins, of the inhabitants of the coast." Calvo, § 2372. And a Russian writer on Prize Law remarks that those depredations, "having brought ruin on poor fishermen and inoffensive traders, could not but leave a painful impression on the minds of the population, without impairing in the least the resources of the Russian government." Katchenovsky, (Pratt's ed.) 148. But the contemporaneous reports of the English naval officers put a different face on the matter, by stating that the destruction in question was part of a military measure, conducted with the coöperation of the French ships, and pursuant to instructions of the English admiral "to clear the seaboard of all fish stores, all fisheries and mills, on a scale beyond the wants of the neighboring population, and indeed of all things destined to contribute to the maintenance of the enemy's army in the Crimea;" and that the property destroyed consisted of large fishing establishments and storehouses of the Russian government, numbers of heavy launches, and enormous quantities of nets and gear, salted fish, corn

and other provisions, intended for the supply of the Russian army. United Service Journal of 1855, pt. 3, pp. 108–112.

Since the English orders in council of 1806 and 1810, before quoted, in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels, honestly pursuing their peaceful industry, has been denied by England, or by any other nation. And the Empire of Japan, (the last State admitted into the rank of civilized nations,) by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained that "the following enemy's vessels are exempt from detention" — including in the exemption "boats engaged in coast fisheries," as well as "ships engaged exclusively on a voyage of scientific discovery, philanthropy or religious mission." Takahashi, International Law, 11, 178.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton* v. *Guyot*, 159 U. S. 113, 163, 164, 214, 215.

Wheaton places, among the principal sources of international law, "Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are gen-

erally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." Wheaton's International Law, (8th ed.) § 15.

Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." 1 Kent Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us, not as one of the law of France only, but as one determined by the general consent of civilized nations.

"Enemy ships," say Pistoye and Duverdy, in their Treatise on Maritime Prizes, published in 1855, "are good prize. Not all, however; for it results from the unanimous accord of the maritime powers that an exception should be made in favor of coast fishermen. Such fishermen are respected by the enemy, so long as they devote themselves exclusively to fishing." 1 Pistoye et Duverdy, tit. 6, c. 1, p. 314.

De Cussy, in his work on the Phases and Leading Cases of the Maritime Law of Nations — *Phases et Causes Célèbres du Droit Maritime des Nations* — published in 1856, affirms in the clearest language the exemption from capture of fishing boats, saying, in lib. 1, tit. 3, § 36, that "in time of war the freedom of fishing is respected by belligerents; fishing boats are considered as neutral; in law, as in principle, they are not subject either to capture or to confiscation;" and that in lib. 2, c. 20, he will state "several facts and several decisions

which prove that the perfect freedom and neutrality of fishing boats are not illusory." 1 De Cussy, p. 291. And in the chapter referred to, entitled *De la Liberté et de la Neutralité Parfaite de la Pêche*, besides references to the edicts and decisions in France during the French Revolution, is this general statement: "If one consulted only positive international law" — *le droit des gens positif* — (by which is evidently meant international law expressed in treaties, decrees or other public acts, as distinguished from what may be implied from custom or usage,) "fishing boats would be subject, like all other trading vessels, to the law of prize; a sort of tacit agreement among all European nations frees them from it, and several official declarations have confirmed this privilege in favor of 'a class of men whose hard and ill rewarded labor, commonly performed by feeble and aged hands, is so foreign to the operations of war.'" 2 De Cussy, 164, 165.

Ortolan, in the fourth edition of his *Règles Internationales et Diplomatie de la Mer*, published in 1864, after stating the general rule that the vessels and cargoes of subjects of the enemy are lawful prize, says: "Nevertheless, custom admits an exception in favor of boats engaged in the coast fishery; these boats, as well as their crews, are free from capture and exempt from all hostilities. The coast fishing industry is, in truth, wholly pacific, and of much less importance, in regard to the national wealth that it may produce, than maritime commerce or the great fisheries. Peaceful and wholly inoffensive, those who carry it on, among whom women are often seen, may be called the harvesters of the territorial seas, since they confine themselves to gathering in the products thereof; they are for the most part poor families who seek in this calling hardly more than the means of gaining their livelihood." 2 Ortolan, 51. Again, after observing that there are very few solemn public treaties which make mention of the immunity of fishing boats in time of war, he says: "From another point of view, the custom which sanctions this immunity is not so general that it can be considered as making an absolute international rule; but it has been so often put in practice, and, besides, it accords so well with the rule in use, in wars on

land, in regard to peasants and husbandmen, to whom coast fishermen may be likened, that it will doubtless continue to be followed in maritime wars to come." 2 Ortolan, 55.

No international jurist of the present day has a wider or more deserved reputation than Calvo, who, though writing in French, is a citizen of the Argentine Republic, employed in its diplomatic service abroad. In the fifth edition of his great work on international law, published in 1896, he observes, in § 2366, that the international authority of decisions in particular cases by the prize courts of France, of England, and of the United States, is lessened by the fact that the principles on which they are based are largely derived from the internal legislation of each country; and yet the peculiar character of maritime wars, with other considerations, gives to prize jurisprudence a force and importance reaching beyond the limits of the country in which it has prevailed. He therefore proposes here to group together a number of particular cases proper to serve as precedents for the solution of grave questions of maritime law in regard to the capture of private property as prize of war. Immediately, in § 2367, he goes on to say: "Notwithstanding the hardships to which maritime wars subject private property, notwithstanding the extent of the recognized rights of belligerents, there are generally exempted, from seizure and capture, fishing vessels." In the next section he adds: "This exception is perfectly justiciable — *Cette exception est parfaitement justiciable*" — that is to say, belonging to judicial jurisdiction or cognizance. Littré, Dict. *voc.* Justiciable; *Hans* v. *Louisiana*, 134 U. S. 1, 15. Calvo then quotes Ortolan's description, above cited, of the nature of the coast fishing industry; and proceeds to refer, in detail, to some of the French precedents, to the acts of the French and English governments in the times of Louis XVI and of the French Revolution, to the position of the United States in the war with Mexico, and of France in later wars, and to the action of British cruisers in the Crimean War. And he concludes his discussion of the subject, in § 2373, by affirming the exemption of the coast fishery, and pointing out the distinction in this regard between the coast fishery and

what he calls the great fishery, for cod, whales or seals, as follows: "The privilege of exemption from capture, which is generally acquired by fishing vessels plying their industry near the coasts, is not extended in any country to ships employed on the high sea in what is called the great fishery, such as that for the cod, for the whale or the sperm whale, or for the seal or sea calf. These ships are, in effect, considered as devoted to operations which are at once commercial and industrial — *Ces navires sont en effet considérés comme adonnés à des opérations à la fois commerciales et industrielles.*" The distinction is generally recognized. 2 Ortolan, 54; De Boeck, § 196; Hall, § 148. See also *The Susa*, 2 C. Rob. 251; *The Johan*, Edw. Adm. 275, and appx. L.

The modern German books on international law, cited by the counsel for the appellants, treat the custom, by which the vessels and implements of coast fishermen are exempt from seizure and capture, as well established by the practice of nations. Heffter, § 137; 2 Kaltenborn, § 237, p. 480; Bluntschli, § 667; Perels, § 37, p. 217.

De Boeck, in his work on Enemy Private Property under Enemy Flag — *de la Propriété Privée Ennemie sous Pavillon Ennemi* — published in 1882, and the only continental treatise cited by the counsel for the United States, says in § 191: "A usage very ancient, if not universal, withdraws from the right of capture enemy vessels engaged in the coast fishery. The reason of this exception is evident; it would have been too hard to snatch from poor fishermen the means of earning their bread." "The exemption includes the boats, the fishing implements and the cargo of fish." Again, in § 195: "It is to be observed that very few treaties sanction in due form this immunity of the coast fishery." "There is, then, only a custom. But what is its character? Is it so fixed and general that it can be raised to the rank of a positive and formal rule of international law?" After discussing the statements of other writers, he approves the opinion of Ortolan (as expressed in the last sentence above quoted from his work) and says that, at bottom, it differs by a shade only from that formulated by Calvo and by some of the German jurists, and that "it is more exact,

without ignoring the imperative character of the humane rule in question — *elle est plus exacte, sans méconnaître le caractère impératif de la règle d'humanité dont il s'agit.*" And, in § 196, he defines the limits of the rule as follows: "But the immunity of the coast fishery must be limited by the reasons that justify it. The reasons of humanity and of harmlessness — *les raisons d'humanité et d'innocuité* — which militate in its favor do not exist in the great fishery, such as the cod fishery; ships engaged in that fishery devote themselves to truly commercial operations, which employ a large number of seamen. And these same reasons cease to be applicable to fishing vessels employed for a warlike purpose, to those which conceal arms, or which exchange signals of intelligence with ships of war; but only those taken in the fact can be rigorously treated; to allow seizure by way of prevention would open the door to every abuse, and would be equivalent to a suppression of the immunity."

Two recent English text-writers, cited at the bar, (influenced by what Lord Stowell said a century since,) hesitate to recognize that the exemption of coast fishing vessels from capture has now become a settled rule of international law. Yet they both admit that there is little real difference in the views, or in the practice, of England and of other maritime nations; and that no civilized nation at the present day would molest coast fishing vessels, so long as they were peaceably pursuing their calling, and there was no danger that they or their crews might be of military use to the enemy. Hall, in § 148 of the fourth edition of his Treatise on International Law, after briefly sketching the history of the positions occupied by France and England at different periods, and by the United States in the Mexican War, goes on to say: "In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any State has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would cap-

ture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption." So T. J. Lawrence, in § 206 of his Principles of International Law, says: "The difference between the English and the French view is more apparent than real; for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own State; and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France when Great Britain gave the order to capture them in 1800."

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice.

Jan Helenus Ferguson, Netherlands Minister to China, and previously in the naval and in the colonial service of his country, in his Manual of International Law for the Use of Navies, Colonies and Consulates, published in 1882, writes: "An exception to the usage of capturing enemy's private vessels at sea is the coast fishery." "This principle of immunity from capture of fishing boats is generally adopted by all maritime powers, and in actual warfare they are universally spared so long as they remain harmless." 2 Ferguson, § 212.

Ferdinand Attlmayr, Captain in the Austrian Navy, in his Manual for Naval Officers, published at Vienna in 1872 under the auspices of Admiral Tegetthoff, says: "Regarding the capture of enemy property, an exception must be mentioned, which is a universal custom. Fishing vessels which belong to the adjacent coast, and whose business yields only a necessary livelihood, are, from considerations of humanity, universally excluded from capture." 1 Attlmayr, 61.

Ignacio de Negrin, First Official of the Spanish Board of Admiralty, in his Elementary Treatise on Maritime International Law, adopted by royal order as a text-book in the Naval Schools of Spain, and published at Madrid in 1873, concludes his chapter "Of the lawfulness of prizes" with these words: "It remains to be added that the custom of all civilized peoples excludes from capture, and from all kind of hostility, the

fishing vessels of the enemy's coasts, considering this industry as absolutely inoffensive, and deserving, from its hardships and usefulness, of this favorable exception. It has been thus expressed in very many international conventions, so that it can be deemed an incontestable principle of law, at least among enlightened nations." Negrin, tit. 3, c. 1, § 310.

Carlos Testa, Captain in the Portuguese Navy and Professor in the Naval School at Lisbon, in his work on Public International Law, published in French at Paris in 1886, when discussing the general right of capturing enemy ships, says: "Nevertheless, in this, customary law establishes an exception of immunity in favor of coast fishing vessels. Fishing is so peaceful an industry, and is generally carried on by so poor and so hardworking a class of men, that it is likened, in the territorial waters of the enemy's country, to the class of husbandmen who gather the fruits of the earth for their livelihood. The examples and practice generally followed establish this humane and beneficent exception as an international rule, and this rule may be considered as adopted by customary law and by all civilized nations." Testa, pt. 3, c. 2, in 18 Bibliothèque International et Diplomatique, pp. 152, 153.

No less clearly and decisively speaks the distinguished Italian jurist, Pasquale Fiore, in the enlarged edition of his exhaustive work on Public International Law, published at Paris in 1885–6, saying: "The vessels of fishermen have been generally declared exempt from confiscation, because of the eminently peaceful object of their humble industry, and of the principles of equity and humanity. The exemption includes the vessel, the implements of fishing, and the cargo resulting from the fishery. This usage, eminently humane, goes back to very ancient times; and although the immunity of fishery along the coasts may not have been sanctioned by treaties, yet it is considered to-day as so definitely established, that the inviolability of vessels devoted to that fishery is proclaimed by the publicists as a positive rule of international law, and is generally respected by the nations. Consequently, we shall lay down the following rule: (*a*) Vessels belonging to citizens of the enemy State, and devoted to fish-

ing along the coasts, cannot be subject to capture. (*b*) Such vessels, however, will lose all right of exemption, when employed for a warlike purpose. (*c*) There may, nevertheless, be subjected to capture vessels devoted to the great fishery in the ocean, such as those employed in the whale fishery, or in that for seals or sea calves." 3 Fiore, § 1421.

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analogous one, should be recognized and declared by a prize court.

By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent Com. 91, note; Halleck, c. 20, § 22; Calvo, § 2376; Hall, § 138.

In 1813, while the United States were at war with England, an American vessel, on her voyage from Italy to the United States, was captured by an English ship, and brought into Halifax in Nova Scotia, and, with her cargo, condemned as lawful prize by the Court of Vice Admiralty there. But a petition for the restitution of a case of paintings and engravings, which had been presented to and were owned by the Academy of Arts in Philadelphia, was granted by Dr. Croke, the judge of that court, who said: "The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species." And he added that there had been "innumerable cases of the mutual exercise of this courtesy between nations in former wars." *The Marquis de Somerueles*, Stewart Adm. (Nova Scotia) 445, 482.

In 1861, during the War of the Rebellion, a similar decision was made, in the District Court of the United States for the Eastern District of Pennsylvania, in regard to two cases of books belonging and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal, and restored to the agent of the university, said: "Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different

character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory." He then referred to the decision in Nova Scotia, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books. *The Amelia*, 4 Philadelphia, 417.

In *Brown* v. *United States*, 8 Cranch, 110, there are expressions of Chief Justice Marshall which, taken by themselves, might seem inconsistent with the position above maintained of the duty of a prize court to take judicial notice of a rule of international law, established by the general usage of civilized nations, as to the kind of property subject to capture. But the actual decision in that case, and the leading reasons on which it was based, appear to us rather to confirm our position. The principal question there was whether personal property of a British subject, found on land in the United States at the beginning of the last war with Great Britain, could lawfully be condemned as enemy's property, on a libel filed by the attorney of the United States, without a positive act of Congress. The conclusion of the court was "that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war." 8 Cranch, 129. In showing that the declaration of war did not, of itself, vest the executive with authority to order such property to be confiscated, the Chief Justice relied on the modern usages of nations, saying: "The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation;" and again: "The modern rule then would seem to be that tangible property

belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property." 8 Cranch, 123, 125. The decision that enemy property on land, which by the modern usage of nations is not subject to capture as prize of war, cannot be condemned by a prize court, even by direction of the executive, without express authority from Congress, appears to us to repel any inference that coast fishing vessels, which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken and confiscated, must be condemned by a prize court, for want of a distinct exemption in a treaty or other public act of the Government.

To this subject, in more than one aspect, are singularly applicable the words uttered by Mr. Justice Strong, speaking for this court: "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime States, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single State, which were at first of limited effect, but which, when generally accepted, became of universal obligation." "This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws; but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact, we think, we may take judicial notice. Foreign municipal laws

must indeed be proved as facts, but it is not so with the law of nations." *The Scotia*, 14 Wall. 170, 187, 188.

The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

On April 21, 1898, the Secretary of the Navy gave instructions to Admiral Sampson, commanding the North Atlantic Squadron, to "immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west." Bureau of Navigation Report of 1898, appx. 175. The blockade was immediately instituted accordingly. On April 22, the President issued a proclamation, declaring that the United States had instituted and would maintain that blockade, "in pursuance of the laws of the United States, and the law of nations applicable to such cases." 30 Stat. 1769. And by the act of Congress of April 25, 1898, c. 189, it was declared that the war between the United States and Spain existed on that day, and had existed since and including April 21. 30 Stat. 364.

On April 26, 1898, the President issued another proclamation, which, after reciting the existence of the war, as declared by Congress, contained this further recital: "It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." This recital was followed by specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels. 30 Stat. 1770. But the proclamation clearly manifests the general policy of the Government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.

On April 28, 1898, (after the capture of the two fishing vessels now in question,) Admiral Sampson telegraphed to the Secretary of the Navy as follows: "I find that a large number of fishing schooners are attempting to get into Havana from their fishing grounds near the Florida reefs and coasts. They are generally manned by excellent seamen, belonging

to the maritime inscription of Spain, who have already served in the Spanish navy, and who are liable to further service. As these trained men are naval reserves, have a semi-military character, and would be most valuable to the Spaniards as artillerymen, either afloat or ashore, I recommend that they should be detained prisoners of war, and that I should be authorized to deliver them to the commanding officer of the army at Key West." To that communication the Secretary of the Navy, on April 30, 1898, guardedly answered: "Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained." Bureau of Navigation Report of 1898, appx. 178. The Admiral's despatch assumed that he was not authorized, without express order, to arrest coast fishermen peaceably pursuing their calling; and the necessary implication and evident intent of the response of the Navy Department were that Spanish coast fishing vessels and their crews should not be interfered with, so long as they neither attempted to violate the blockade, nor were considered likely to aid the enemy.

The Paquete Habana, as the record shows, was a fishing sloop of 25 tons burden, sailing under the Spanish flag, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba. Her crew consisted of but three men, including the master; and, according to a common usage in coast fisheries, had no interest in the vessel, but were entitled to two thirds of her catch, the other third belonging to her Spanish owner, who, as well as the crew, resided in Havana. On her last voyage, she sailed from Havana along the coast of Cuba, about two hundred miles, and fished for twenty-five days off the cape at the west end of the island, within the territorial waters of Spain; and was going back to Havana, with her cargo of live fish, when she was captured by one of the blockading squadron, on April 25, 1898. She had no arms or ammunition on board; she had no knowledge of the blockade, or even of the war, until she was stopped by a blockading vessel; she made no attempt to run the blockade, and no resistance at the time of the capture; nor was there any evi-

dence whatever of likelihood that she or her crew would aid the enemy.

In the case of the Lola, the only differences in the facts were that she was a schooner of 35 tons burden, and had a crew of six men, including the master; that after leaving Havana, and proceeding some two hundred miles along the coast of Cuba, she went on, about a hundred miles farther, to the coast of Yucatan, and there fished for eight days; and that, on her return, when near Bahia Honda, on the coast of Cuba, she was captured, with her cargo of live fish, on April 27, 1898. These differences afford no ground for distinguishing the two cases.

Each vessel was of a moderate size, such as is not unusual in coast fishing smacks, and was regularly engaged in fishing on the coast of Cuba. The crew of each were few in number, had no interest in the vessel, and received, in return for their toil and enterprise, two thirds of her catch, the other third going to her owner by way of compensation for her use. Each vessel went out from Havana to her fishing ground, and was captured when returning along the coast of Cuba. The cargo of each consisted of fresh fish, caught by her crew from the sea, and kept alive on board. Although one of the vessels extended her fishing trip across the Yucatan Channel and fished on the coast of Yucatan, we cannot doubt that each was engaged in the coast fishery, and not in a commercial adventure, within the rule of international law.

The two vessels and their cargoes were condemned by the District Court as prize of war; the vessels were sold under its decrees; and it does not appear what became of the fresh fish of which their cargoes consisted.

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore, in each case,

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

Dissenting Opinion: Fuller, C.J., Harlan, McKenna, JJ.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA, dissenting.

The District Court held these vessels and their cargoes liable because not "satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure."

This court holds otherwise, not because such exemption is to be found in any treaty, legislation, proclamation or instruction, granting it, but on the ground that the vessels were exempt by reason of an established rule of international law applicable to them, which it is the duty of the court to enforce.

I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been taken in the ordinary exercise of discretion in the conduct of war.

It cannot be maintained "that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power." That position was disallowed in *Brown* v. *The United States*, 8 Cranch, 110, 128, and Chief Justice Marshall said: "This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary."

The question in that case related to the confiscation of the property of the enemy on land within our own territory, and it was held that property so situated could not be confiscated without an act of Congress. The Chief Justice continued: "Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a

question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary."

This case involves the capture of enemy's property on the sea, and executive action, and if the position that the alleged rule *proprio vigore* limits the sovereign power in war be rejected, then I understand the contention to be that, by reason of the existence of the rule, the proclamation of April 26 must be read as if it contained the exemption in terms, or the exemption must be allowed because the capture of fishing vessels of this class was not specifically authorized.

The preamble to the proclamation stated, it is true, that it was desirable that the war "should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice," but the reference was to the intention of the Government "not to resort to privateering, but to adhere to the rules of the Declaration of Paris;" and the proclamation spoke for itself. The language of the preamble did not carry the exemption in terms, and the real question is whether it must be allowed because not affirmatively withheld, or, in other words, because such captures were not in terms directed.

These records show that the Spanish sloop Paquete Habana "was captured as a prize of war by the U. S. S. Castine" on April 25, and "was delivered" by the Castine's commander "to Rear Admiral Wm. T. Sampson, (commanding the North Atlantic Squadron,)" and thereupon "turned over" to a prize master with instructions to proceed to Key West.

And that the Spanish schooner Lola "was captured as a prize of war by the U. S. S. Dolphin," April 27, and "was delivered" by the Dolphin's commander "to Rear Admiral Wm. T. Sampson, (commanding the North Atlantic Squadron,)" and thereupon "turned over" to a prize master with instructions to proceed to Key West.

That the vessels were accordingly taken to Key West and there libelled, and that the decrees of condemnation were entered against them May 30.

It is impossible to concede that the Admiral ratified these captures in disregard of established international law and the proclamation, or that the President, if he had been of opinion that there was any infraction of law or proclamation, would not have intervened prior to condemnation.

The correspondence of April 28, 30, between the Admiral and the Secretary of the Navy, quoted from in the principal opinion, was entirely consistent with the validity of the captures.

The question put by the Admiral related to the detention as prisoners of war of the persons manning the fishing schooners "attempting to get into Havana." Non-combatants are not so detained except for special reasons. Sailors on board enemy's trading vessels are made prisoners because of their fitness for immediate use on ships of war. Therefore the Admiral pointed out the value of these fishing seamen to the enemy, and advised their detention. The Secretary replied that if the vessels referred to were "attempting to violate blockade" they were subject "with crew" to capture, and also that they might be detained if "considered likely to aid enemy." The point was whether these crews should be made prisoners of war. Of course they would be liable to be if involved in the guilt of blockade running, and the Secretary agreed that they might be on the other ground in the Admiral's discretion.

All this was in accordance with the rules and usages of international law, with which, whether in peace or war, the naval service has always been necessarily familiar.

I come then to examine the proposition "that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies,

cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in of fresh fish, are exempt from capture as prize of war."

This, it is said, is a rule "which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of treaty or other public act of their own government."

At the same time it is admitted that the alleged exemption does not apply "to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way;" and further that the exemption has not "been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce."

It will be perceived that the exceptions reduce the supposed rule to very narrow limits, requiring a careful examination of the facts in order to ascertain its applicability; and the decision appears to me to go altogether too far in respect of dealing with captures directed or ratified by the officer in command.

But were these two vessels within the alleged exemption? They were of twenty-five and thirty-five tons burden respectively. They carried large tanks, in which the fish taken were kept alive. They were owned by citizens of Havana, and the owners and the masters and crew were to be compensated by shares of the catch. One of them had been two hundred miles from Havana, off Cape San Antonio, for twenty-five days, and the other for eight days off the coast of Yucatan. They belonged, in short, to the class of fishing or coasting vessels of from five to twenty tons burden, and from twenty tons upwards, which, when licensed or enrolled as prescribed by the Revised Statutes, are declared to be vessels of the United States, and the shares of whose men, when the vessels are employed in fishing, are regulated by statute. They were engaged in what were substantially commercial ventures, and the mere fact that the fish were kept alive by contrivances

for that purpose — a practice of considerable antiquity — did not render them any the less an article of trade than if they had been brought in cured.

I do not think that, under the circumstances, the considerations which have operated to mitigate the evils of war in respect of individual harvesters of the soil can properly be invoked on behalf of these hired vessels, as being the implements of like harvesters of the sea. Not only so as to the owners but as to the masters and crews. The principle which exempts the husbandman and his instruments of labor, exempts the industry in which he is engaged, and is not applicable in protection of the continuance of transactions of such character and extent as these.

In truth, the exemption of fishing craft is essentially an act of grace, and not a matter of right, and it is extended or denied as the exigency is believed to demand.

It is, said Sir William Scott, "a rule of comity only, and not of legal decision."

The modern view is thus expressed by Mr. Hall: "England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any State has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption."

In the Crimean War, 1854–5, none of the orders in council, in terms, either exempted or included fishing vessels, yet the allied squadrons swept the Sea of Azof of all craft capable of furnishing the means of transportation, and the English admiral in the Gulf of Finland directed the destruction of all Russian coasting vessels, not of sufficient value to be detained as prizes, except "boats or small craft which may be found empty at anchor, and not trafficking."

It is difficult to conceive of a law of the sea of universal obligation to which Great Britain has not acceded. And I

am not aware of adequate foundation for imputing to this country the adoption of any other than the English rule.

In his Lectures on International Law at the Naval Law College the late Dr. Freeman Snow laid it down that the exemption could not be asserted as a rule of international law. These lectures were edited by Commodore Stockton and published under the direction of the Secretary of the Navy in 1895, and, by that department, in a second edition, in 1898, so that in addition to the well-known merits of their author they possess the weight to be attributed to the official imprimatur. Neither our treaties nor settled practice are opposed to that conclusion.

In view of the circumstances surrounding the breaking out of the Mexican War, Commodore Conner, commanding the Home Squadron, on May 14, 1846, directed his officers, in respect of blockade, not to molest "Mexican boats engaged exclusively in fishing on any part of the coast," presumably small boats in proximity to the shore; while on the Pacific coast Commodore Stockton in the succeeding August ordered the capture of "all vessels under the Mexican flag."

The treaties with Prussia of 1785, 1799 and 1828, and of 1848 with Mexico, in exempting fishermen, "unarmed and inhabiting unfortified towns, villages or places," did not exempt fishing vessels from seizure as prize; and these captures evidence the convictions entertained and acted on in the late war with Spain.

It is needless to review the speculations and repetitions of the writers on international law. Ortolan, De Boeck and others admit that the custom relied on as consecrating the immunity is not so general as to create an absolute international rule; Heffter, Calvo and others are to the contrary. Their lucubrations may be persuasive, but are not authoritative.

In my judgment, the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended.

Modification of Decree.

Exemptions may be designated in advance, or granted according to circumstances, but carrying on war involves the infliction of the hardships of war at least to the extent that the seizure or destruction of enemy's property on sea need not be specifically authorized in order to be accomplished.

Being of opinion that these vessels were not exempt as matter of law, I am constrained to dissent from the opinion and judgment of the court; and my brothers Harlan and McKenna concur in this dissent.

On January 29, 1900, the court, in each case, on motion of the Solicitor General in behalf of the United States, and after argument of counsel thereon, and to secure the carrying out of the opinion and decree according to their true meaning and intent, ordered that the decree be so modified as to direct that the damages to be allowed shall be compensatory only, and not punitive.